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Supreme Court, U.S.
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No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER,

v.

MARIO ECHAZABAL, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 9, 2001
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RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, No. 97-CV-3498

No.	Date	General Description
1	5/8/97	Notice of removal by defendant Chevron USA Inc. from LA Cnty Superior Court
- -	5/8/97	1st Amended Complaint
- -	5/8/97	Answer by defendant Chevron USA Inc.
2	5/8/97	Joinder by defendant Irwin Industries Inc. joining removal complaint
7	7/7/97	Answer by defendant Irwin Industries Inc.
17	10/6/97	Motion by defendant Chevron USA Inc. for summary judgment
- -	10/6/97	Lodged Chevron's statement of uncontroverted facts
18	10/6/97	Exhibits in support of Chevron's summary judgment motion
19	11/14/97	Plaintiff's memo in opposition to Chevron's motion for summary judgment [17-1]
20	11/14/97	Plaintiff's statement of general issues in opposition to Chevron's motion for summary judgment [17-1]

No.	Date	General Description
21	11/14/97	Plaintiff's evidentiary objections in support of his opposition to summary judgment [19-1]
22	11/14/97	Declaration of Marion Joseph Fedoruk MD, Gary Gitnick MD, FACG, Mario Echazabal and Larry Minsky in support of plaintiff's opposition to summary judgment
24	11/18/97	Motion by defendant Irwin Industries Inc. for summary judgment
25	11/18/97	Exhibits supporting Irwin's motion for summary judgment
26	11/24/97	Chevron's reply to opposition to motion for summary judgment [17-2]
28	12/1/97	Plaintiff's memo in opposition to Irwin's motion for summary judgment [24-2]
29	12/1/97	Plaintiff's evidentiary objection supporting opposition to Irwin's motion for summary judgment [24-2]
30	12/1/97	Plaintiff's statement of general issues in opposition to Irwin's motion for summary judgment [24-1]
31	12/1/97	Plaintiff's supplemental declaration of M Echazabal and L Minsky in support of opposition to Irwin's motion for summary judgment [24-1]

No.	Date	General Description
32	12/4/97	Irwin's reply brief in support of motion for summary judgment [24-1] [24-2]
39	1/5/98	Order by Judge Lourdes G. Baird Grant in part Deny in part Irwin's motion for partial summary judgment [24-1], Grant in part Deny in part Irwin's motion for summary judgment [24-2]; dft Irwin mot for S/J is Denied as to the first and second causes of actn, but GR as to the issue of pun dams; granting Chevron's motion for summary judgment [17-1], granting Chevron's motion for partial summary judgment [17-2] [Entry date 01/08/98]
43	2/26/98	Order by Judge Lourdes G. Baird granting plaintiff's motion to certify order granting summary judgment to Chevron for immediate appeal [Entry date 03/04/98]
44	3/9/98	Notice of Appeal
51	5/14/98	Stipulation and Order modifying certification for immediate appeal to include plaintiff's 6th cause of action for Intentional Interference with Contractual Relations [Entry date 05/18/98]

RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, No. 98-55551

Date	General Description
7/29/98	Filed appellant Echazabal's opening brief and excerpts of record in 3 volumes
8/4/98	Filed EEOC's amicus brief
9/16/98	Rec'd Amicus Employers Group's brief
9/16/98	Rec'd Amicus Equal Employment Advisory Council & Chamber of Commerce's brief
9/16/98	Filed appellee Chevron's brief
10/15/98	Filed appellant Echazabal's reply brief, and Suppl Exc of Rec in 1 volume
11/3/99	Argued and submitted to Myron H. Bright, Stephen R. Reinhardt, Stephen S. Trott
11/8/99	Filed order (Myron H. Bright, Stephen R. Reinhardt, Stephen S. Trott): The ct may consider the question whether the "direct threat" defense set forth in 42 USC § 12113(b) applies to threats to the health or safety of parties claiming discrimination or only to threats to the health or safety of "others." If either of the parties to this appeal or the EEOC wishes to submit a supp'l brf on this question, it shall notify the ct of its intention to do so w/i 7 days from the date of this order, with svc on

Date	General Description
	the parties and amici. If such ntc is given, the parties and amici shall each have the option of filing a supp'l brief. Any such brf shall be filed w/i 28 days from the date of this order. A brf filed by a party or the EEOC shall not exceed 15 pages; a brf filed by any other amici shall not exceed 5 pages.
12/14/99	Filed Amicus Equal Employment Advisory Council Chamber of Commerce supplemental brief
12/15/99	Filed appellant's supplemental brief
12/16/99	Rec'd amicus EEOC's ltr dated 12/15/99 re: they will not be filing a suppl brief
12/16/99	Filed appellee Chevron's supplemental brief
1/25/00	Filed order (Myron H. Bright, Stephen R. Reinhardt & Stephen S. Trott): the case is ordered resubmitted.
5/23/00	Filed Opinion: Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Myron H. Bright; Stephen R. Reinhardt; Stephen S. Trott) Filed entered judgment.
5/23/00	Filed Memorandum Disposition: Reversed and remanded for further proceedings consistent with this disposition. (Terminated on the Merits after Oral Hearing; Reversed; Written, Unsigned, Unpublished. Myron H. Bright, Stephen

Date	General Description
	R. Reinhardt, Stephen S. Trott) Filed and entered judgment.
6/12/00	Filed appellee Chevron's petition for rehearing with suggestion for rehearing en banc
6/16/00	Filed order (Myron H. Bright, Stephen R. Reinhardt & Stephen S. Trott) aplt is ordered to file a response to the petition for rehearing with suggestion for rehearing en banc
7/6/00	Filed aplt's response to petition for rehearing with suggestion for rehearing enbanc rehearing
9/26/00	Filed order and amended opinion: The opinion filed on 5/23/00 is amended to include the attached dissent by Judge Trott.
12/12/00	Filed order: The petition for rehearing and petition for rehearing en banc are denied.
12/20/00	Mandate issued. Costs taxed.

[PLAINTIFF'S FIRST AMENDED COMPLAINT*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MARIO ECHAZABAL, an individual, Plaintiff,

vs.

CHEVRON U.S.A., INC.; a corporation; IRWIN INDUSTRIES, INC., a corporation; and DOES I through XXX, inclusive, Defendants.

Case No: BC-166431

First Amended Complaint For Injunctive Relief And Damages For Employment Discrimination On The Basis Of Disability; Violation Of Constitutional Right Of Privacy; Violation Of The Confidentiality Of Medical Information Act; Intentional Interference With Contractual Relations
Demand for Jury Trial

[Filed April 8, 1997]

I.
[PARTIES]

1. Plaintiff MARIO ECHAZABAL (Plaintiff) is and was at relevant times herein a resident of the County of Los Angeles

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* [Plaintiff's First Amended Complaint and all other materials in this Appendix are reproduced verbatim. Typographical errors have been preserved.]

and an employee within the meaning of the various discrimination statutes alleged herein.

2. Plaintiff is informed, believes and thereupon alleges that at times relevant herein, Chevron Products Company, a successor to Chevron U.S.A. Products Company, was a wholly owned division of Defendant CHEVRON U.S.A., INC., a Pennsylvania corporation doing business within the state of California. At all times relevant herein, CHEVRON U.S.A., INC. controlled, managed, supervised, and was fully responsible for the acts, conduct and omissions as alleged herein of Chevron Products Company/Chevron USA Products Company's oil refinery located at 324 West El Segundo Boulevard, El Segundo, California (Plant). Unless otherwise specified, Chevron Products Company and its successor, Chevron U.S.A. Products Company, and Chevron U.S.A., Inc. shall be collectively referred to as Chevron. Plaintiff is informed, believes and thereupon alleges that at times relevant herein, Chevron was a federal contractor having contracts in excess of $50,000 and an employer within the meaning of § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 794 et seq. (Section 504) and within the meaning of Titles I and II of the Americans With Disabilities Act of 1990 as amended, 42 U.S.C. §§ 12101 et seq. (ADA) and within the meaning of California's Fair Employment and Housing Act (FEHA).

3. Defendant IRWIN INDUSTRIES, INC. (Irwin) is a California corporation qualified to do and doing business within the state of California and an employer within the meaning of the ADA and FEHA.

4. Defendants Does I Through XXX are sued herein under fictitious names because Plaintiff does not presently know their true names and capacities. Plaintiff will seek leave to amend this Complaint to allege their true names and capacities when ascertained. Plaintiff further alleges that each defendant, fictitious or otherwise, named herein was and is culpable in some manner or capacity for the events and illegal conduct

herein alleged or is/are a necessary party for obtaining appropriate relief. Defendants Chevron, Irwin and Does I through XXX shall at times herein be collectively referred to as Defendants.

5. Plaintiff is informed, believes and thereupon alleges that in carrying out each of the acts, conduct, omissions and violations alleged in this complaint, each defendant, fictitiously or individually named, acted as an agent, principal, and/or representative for each other defendant.

II.
[EXHAUSTION OF ADMINISTRATIVE REMEDIES]

6. All procedural and jurisdictional conditions precedent to the filing and maintaining of this action have been exhausted to the extent any were required to be exhausted. On or about March 22, 1996, Plaintiff filed a charge of employment discrimination against Defendants Chevron and Irwin with the Equal Employment Opportunity Commission (EEOC) alleging disability discrimination. Thereafter, Plaintiff was issued/notified by the Department of Fair Employment and Housing (DFEH), by letter dated March 22, 1996, and by the EEOC by letter dated December 6, 1996 of his right to sue. On or about February 20, 1997, Plaintiff filed an additional charge of disability discrimination against Chevron with the DFEH and by letter dated March 12, 1997 the DFEH issued Plaintiff his right to sue.

III.
[EQUITY AND IRREPARABLE INJURY]

7. Plaintiff has no plain, adequate or complete remedy to redress the wrongs alleged herein and this suit for injunctive relief is his only means of securing said adequate relief. Plaintiff is presently suffering and will continue to suffer irreparable injury as a result of the acts, conduct and omissions of Defendants as alleged herein who have denied Plaintiff his right of privacy and his right to be free from illegal

discrimination and will continue to maintain said illegal practices and policies as alleged herein until and unless enjoined by this court.

IV.
[COMMON ALLEGATIONS OF FACT]

8. Plaintiff worked at the Plant from in or about 1972 through 1975 and again from in or about 1980 through on or about February 28, 1996, working in various jobs including maintenance worker, pipefitter, and on the "firewatch."

9. In or about 1986, Irwin became a maintenance contractor for Chevron at the Plant. Plaintiff then became an Irwin employee. Plaintiff continued to perform the same or similar functions/jobs.

10. Plaintiff was hired by Irwin in or about 1986.

11. Throughout the period of his employment with Irwin and throughout the period of time that Plaintiff worked at the Plant, and specifically since at least in or about 1986, Plaintiff performed all of the essential functions of each and every position required of him in a competent and professional manner without injury to himself or others.

12. In or about the latter part of 1992, Plaintiff was diagnosed with having chronic active hepatitis. This information was provided directly to Chevron. Between the latter part of 1992 and approximately February of 1996, Chevron was advised of Plaintiff's ongoing medical condition and was provided with copies of medical reports from Plaintiff's physician(s) advising Chevron that despite his diagnosis of chronic active hepatitis that he did not pose a threat to himself or others and could, from a medical perspective, perform all of the essential functions for each job/position he was assigned.

13. On or about October 11, 1995, Plaintiff applied for employment directly with Chevron, seeking to be hired into the position of Plant Helper. Thereafter, by letter dated December 28, 1995, Chevron offered Plaintiff the position of Plant Helper, but that said offer was contingent upon Plaintiff completing a pre-employment physical examination.

14. On or about January 2, 1996, Plaintiff underwent the pre-employment physical examination required by Chevron. By letter dated February 6, 1996, Chevron advised Plaintiff that they had determined that Plaintiff's disability prevented/precluded Plaintiff from performing the tasks of the position of Plant Helper, and accordingly, Chevron was withdrawing its offer of employment. That same letter also advised Plaintiff that Chevron would keep the results of that pre-employment physical examination confidential. Thereafter, by letter dated February 21, 1996, Chevron advised Irwin that they had determined that Plaintiff's disability prevented/precluded Plaintiff from working anywhere within the Plant, and accordingly, Chevron requested/instructed Irwin to remove Plaintiff from performing any job within the Plant.

15. On or about February 28, 1996, Plaintiff was advised by Irwin that both Irwin and Chevron had determined that Plaintiff would no longer be permitted to perform any job at the Plant because of his disability even though Plaintiff was fully capable of performing the position of Plant Helper as well as other positions/jobs within the Plant without injury to himself or others.

16. On or about February 28, 1996, Plaintiff met with Irwin's director of human resources, Manfred F. Kiesser, who affirmed that Plaintiff would no longer be permitted to perform any work at the Plant.

17. On or about March 8, 1996, Irwin's medical advisor informed Irwin, who in turn informed Plaintiff, that Plaintiff would no longer be entitled to perform any work at the Plant or

any other refinery because Plaintiff had chronic active hepatitis. Furthermore, Plaintiff was informed that due to his training, knowledge, experience and disability, there was no other work available for him through Irwin.

18. Plaintiff is informed, believes and thereupon alleges that at no time did Plaintiff ever authorize Chevron or any other person or entity to provide any of his personnel and/or medical records to Irwin or any health care practitioner for Irwin.

19. As a direct and proximate result of the aforementioned acts, omissions and conduct of Defendants Irwin, Chevron, and Does I through XXX as alleged herein, Plaintiff has been deprived of his ability to continue employment in his chosen profession or other similar positions from Defendants, has lost and will continue to lose income and benefits from the date of his termination forward, together with prejudgment interest thereon in an amount to be proven at the time of trial.

20. As a further direct and proximate result of the aforementioned acts, conduct and omissions of Defendants Chevron, Irwin and Does I through XXX, Plaintiff has been damaged financially and professionally and particularly become emotionally upset, distressed, aggravated, and has suffered embarrassment, mortification, humiliation, dignity, and loss of reputation. Plaintiff claims damages therefrom including the cost of medical care, all in an amount to be proven at the time of trial.

21. Defendants Chevron, Irwin and Does I through XXX intentionally, knowingly and illegally deprived Plaintiff of his rights, including illegally terminating his employment and thereafter or contemporaneously illegally violating his privacy rights/rights of confidentiality with the knowledge that he would be damaged thereby. At times relevant herein, Defendants Chevron, Irwin and Does I through XXX knew that Plaintiff would suffer severe financial and emotional injury by and through their wrongful, illegal and malicious acts and

conducts as alleged herein in denying, terminating, and thereafter interfering with Plaintiff's right of continued employment as well as by breaching his rights or privacy and confidentiality.

22. The acts, conduct and grossly negligent omissions taken together toward Plaintiff were carried out by managerial employees, officers, and agents of Defendants Chevron, Irwin, and Does I through XXX and were done in a deliberate, cold, callous and intentional manner in order to injure and damage Plaintiff. By and through their acts, conduct and omissions, Plaintiff has been injured thereby and Plaintiff is entitled to an award of punitive damages.

V.
[CLAIMS FOR RELIEF]

A.
[FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS]

VIOLATION OF THE FAIR EMPLOYMENT AND HOUSING ACT: DISABILITY DISCRIMINATION (Cal. Gov't Code §§12920 et seq.)

23. Plaintiff realleges each and every allegation of paragraphs one through and including twenty-two of this complaint and incorporates them herein by reference as allegations asserting a violation of the FEHA for disability discrimination.

24. At times relevant herein and especially as of the applicable dates of the aforementioned illegal discriminatory conduct as alleged herein, Plaintiff was a qualified individual with a disability within the meaning of the disability discrimination statutes alleged herein.

25. At all times relevant to his employment with Irwin and at all times relevant to his application for employment with

Chevron, Plaintiff was able to perform in a professional and competent manner, with or without reasonable accommodation, all of the essential functions of each position/job function he preformed for Irwin at the Plant or for which he had applied with Chevron without injury to himself or others.

26. At all times relevant to his application process for employment with Chevron as a Plant Helper, Chevron was required to maintain all of Plaintiff's applications, personnel and medical records in strict confidence in accordance with provisions of law. At all times relevant to his employment with Irwin, Irwin was required to maintain all of Plaintiff's medical records in strict confidence in accordance with the provisions of law.

27. Plaintiff is informed, believes and thereupon alleges that in or about early 1996, without Plaintiff's authorization, Chevron failed to maintain Plaintiff's medical information/records/reports in a confidential manner as required by law and thereafter released said confidential personnel and medical records to unauthorized persons and entities including Defendant Irwin, its employees and agents. Plaintiff is informed, believes and thereupon alleges that at the time of said unauthorized release of personnel and medical information, Chevron knew or should have known that said medical and personnel information was confidential, could not be released without Plaintiff's authorization, and that Plaintiff had not provided Chevron with any such release.

28. The aforementioned acts and conduct of Defendant Chevron and Does I through XV was willful and intentional and constitutes illegal employment discrimination on the basis of disability in violation of Plaintiff's rights under FEHA.

29. The aforementioned acts and conduct of Defendants Irwin and Does XVI through XXX was intentional and willful and constitutes illegal employment discrimination on the basis of disability in violation of Plaintiff's rights under FEHA.

30. As a direct and proximate result of the aforementioned acts, conducts and omissions of Defendants Chevron, Irwin and Does I through XXX, Plaintiff has been damaged and is entitled to be made whole with respect to all terms and conditions of employment he would have enjoyed including an order to be hired or reinstated into the same or comparable position. As a further direct and proximate result of the aforementioned conduct, Plaintiff is entitled to prejudgment interest together with all other general, compensatory and punitive damages in an amount subject to proof at the time of trial.

31. Plaintiff is further entitled to an award of reasonable attorneys' fees as provided by FEHA.

B.
[SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS]

VIOLATION OF THE AMERICANS WITH DISABILITY ACT (42 U.S.C. §§12101 et seq.)

32. Plaintiff realleges each and every allegation of paragraphs one through and including thirty-one of this complaint and incorporates them herein by reference as asserting a claim for disability discrimination under Title I and Title II of the ADA as against Chevron and under Title I of the ADA as against Irwin.

33. The aforementioned acts and conduct of Defendant Chevron and Does I through XV in (a) rejecting/refusing to hire Plaintiff because of his disability and (b) refusing to permit Plaintiff to work in any position at the Plant because of his disability and (c) by failing to maintain in confidence and thereafter releasing privileged and confidential medical/personnel information without Plaintiff's proper authorization was intentional and willful and constitutes illegal employment discrimination on the basis of disability in violation of Plaintiff's rights under Titles I and II of the ADA.

34. The aforementioned acts and conduct of Defendants Irwin and Does XVI through XXX in terminating Plaintiff's employment and/or refusing to permit Plaintiff to continue to work at the Plant or at any other facility or refinery where Irwin employed persons such as Plaintiff was intentional and willful and constitutes illegal employment discrimination on the basis of disability in violation of Plaintiff's rights under Title I of the ADA.

35. As a direct and proximate result of the aforementioned acts, conducts and omissions of Defendants Chevron, Irwin and Does I through XXX, Plaintiff has been damaged and is entitled to be made whole with respect to all terms and conditions of employment he would have enjoyed including an order to be hired or reinstated into the same or comparable position. As a further direct and proximate result of the aforementioned conduct, Plaintiff is entitled to prejudgment interest together with all other general, compensatory and punitive damages in an amount subject to proof at the time of trial.

36. Plaintiff is further entitled to an award of reasonable attorneys' fees from said Defendants as permitted by the ADA.

C.
[THIRD CAUSE OF ACTION AGAINST CHEVRON ONLY]

VIOLATION OF SECTION 504, 29 U.S.C. §§794 et seq.

37. Plaintiff realleges each and every allegation of paragraphs one through and including thirty-six of this complaint and incorporates them herein by reference as asserting a claim for disability discrimination only as against Chevron under Section 504.

38. The aforementioned conduct of Defendant Chevron in refusing to hire Plaintiff in or about February of 1996 and thereafter refusing to allow Plaintiff to perform any position within the Plant was intentional and willful and constitutes

illegal employment discrimination on the basis of his disability in violation of Plaintiff's rights under Section 504.

39. As a direct and proximate result of Defendant Chevron's acts, conduct and omissions as alleged herein, Plaintiff is entitled to an order requiring Chevron to hire Plaintiff into the position of Plant Helper or a comparable position with comparable pay and benefits and to be made whole from the date of his rejection of employment forward with respect to each and every term, condition and entitlement of the employment he would have enjoyed with Chevron had he been hired, together with prejudgment interest thereon together with other general, compensatory and punitive damages in an amount subject to proof at the time of the trial.

40. Plaintiff is further entitled to an award of reasonable attorneys' fees as permitted by Section 504 as amended.

D.
[FOURTH CAUSE OF ACTION AGAINST CHEVRON]

VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHT OF PRIVACY (Article I of the California Constitution)

41. Plaintiff realleges each and every allegation of paragraphs one through five and seven through twenty-two of this complaint and incorporates them herein by reference as allegations asserting a violation of Plaintiff's right of privacy guaranteed him under Article I of the California Constitution as against Chevron only.

42. At all times relevant to Plaintiff's applications for employment with Chevron, Article I of the California Constitution obligated Chevron to guarantee to Plaintiff that his personnel records, including all medical records pertaining to him would be maintained in a private and confidential manner in keeping with said privacy rights guarantees. At all times relevant herein, Plaintiff had an entitlement to and did

reasonably believe that his personnel files, including his medical records, would be maintained in strict confidence and that they would not be dispensed, transmitted, dispersed, discussed, nor any matters contained therein conveyed or communicated in any manner to any person or entity unless the disclosure of same was authorized by Plaintiff.

43. At all times relevant herein, Defendant Chevron knew or should have known that any personnel records, including medical records, provided to Chevron by Plaintiff or created/generated/prepared in conjunction with Plaintiff's applications for employment with Chevron must be maintained in a confidential manner and could not be released without authorization by Plaintiff.

44. Plaintiff is informed, believes and thereupon alleges that on at least one occasion occurring in or about early 1996, Chevron and/or Does I through XV illegally and intentionally dispensed, disseminated, transmitted, mailed, transferred or in some manner communicated to agents, officers or employees of Irwin confidential medical/personnel records/information of or pertaining to Plaintiff which was within the control or possession of Chevron without first obtaining Plaintiff's authorization before disclosing said confidential information. The unauthorized release of said private and confidential information constitutes a serious invasion of Plaintiff's privacy rights.

45. As a direct and proximate result of said wrongful conduct as alleged herein, Plaintiff has been damaged and is entitled to an award of general, compensatory and punitive damages in an amount to be proven at the time of trial, together with prejudgment interest thereon.

E.

[FIFTH CAUSE OF ACTION AGAINST CHEVRON]

VIOLATION OF THE CONFIDENTIALITY OF MEDICAL INFORMATION ACT (Cal. Civil Code §§56 et seq.)

46. Plaintiff realleges each and every allegation of paragraphs one through five and seven through twenty-two and forty-one through forty-five and incorporates them by reference as if fully set forth as allegations asserting a violation of California' Confidentiality of Medical Information Act (CMIA) as against Chevron only.

47. Plaintiff is informed, believes and thereupon alleges that in or about early 1996, Defendant Chevron, without proper authorization by Plaintiff as required by the Confidentiality of Medical Information Act, California Civil Code §§56 et seq., disclosed, disseminated and in some manner communicated to Defendant Irwin, its agents, officers and/or employees confidential medical information/records within Chevron's possession or under its control. Plaintiff is informed, believes and thereupon alleges that at times relevant herein, Defendant Chevron knew or should have know that the disclosure of said confidential medical information could not be released, disseminated, or communicated to others unless the disclosure of which had been authorized by Plaintiff. At all times relevant herein, Plaintiff had not authorized the disclosure of said medical information/records to Irwin.

48. As a direct and proximate result of the illegal disclosure of Plaintiff's medical information to Irwin and/or its agents in violation of CMIA, Plaintiff has been damaged and is entitled to an award of general, compensatory and punitive damages a permitted by law, all in an amount to be proven at the time of trial, together with prejudgment interest and attorneys' fees as permitted by law.

F.

[SIXTH CAUSE OF ACTION AGAINST CHEVRON ONLY]

INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

49. Plaintiff realleges each and every allegation of paragraphs one through five and seven through forty-seven of this complaint and incorporates them herein by reference as if fully set forth as allegations asserting a cause of action against Chevron for intentional interference with Plaintiff's contractual relations with Irwin.

50. At all times relevant herein, Defendant Chevron knew that Plaintiff had a contract of employment with Irwin to work at the Plant and further that Plaintiff desired to continue to work at the Plant.

51. As a direct and proximate result of the aforementioned illegal acts and conduct of Defendant Chevron in directing, advising, and instructing Irwin to prohibit Plaintiff from continuing to work at the Plant, and thereafter by disclosing confidential medical records/information to officers, employees, and/or agents of Irwin which Defendant Chevron knew or should have known that the release/dissemination/communication of said confidential medical information would prevent Plaintiff from continuing to work for Irwin at the Plant or at any refinery, Defendant Chevron intentionally and illegally interfered with Plaintiff's contract of employment with Irwin.

52. As a direct and proximate result of the aforementioned acts and conduct of Defendant Chevron, Plaintiff has lost employment together with benefits and entitlements to employment with Irwin in an amount to be proven at the time of trial, together with such other general, compensatory and punitive damages in an amount to be proven at the time of trial, together with prejudgment interest thereon.

V.

[PRAYER FOR RELIEF]

WHEREFORE, Plaintiff demands judgment from Defendants as follows:

1. <u>INJUNCTIVE RELIEF AGAINST DEFENDANTS CHEVRON AND IRWIN</u>:

Plaintiff prays that this Court specifically enjoin Defendants Chevron and Irwin:

(a) to expunge all personnel and/or medical records to the extent they state, suggest, or imply that Plaintiff is physically incapable of or should not or cannot perform the job for which he sought to be hired or for which he was hired and maintain said records in accordance with law;

(b) to provide as to Chevron a clear written standard as to when Defendants may release confidential personnel and/or medical records and how said records must be maintained for any applicant or employee;

(c) to order Defendant Chevron to hire Plaintiff into the position of Plant helper or the next comparable position with comparable pay and benefits;

(d) in the event Chevron is not ordered to hire Plaintiff, to order Defendant Irwin to reinstate Plaintiff into the last position he held or the next comparable position with comparable pay and benefits.

2. <u>ALL CAUSES OF ACTION AGAINST DEFENDANTS CHEVRON AND DOES I THROUGH XV</u>:

Plaintiff prays to be made whole with respect to all lost wages and benefits as well as each term, condition and entitlement of employment he would have had with Defendant Chevron but for Chevron's illegal rejection of his 1995/1996 application for employment from the date of his rejection forward, including but not limited to all front and back pay, retirement/pension, and medical benefits, together with prejudgment interest thereon in an amount subject to proof at the time of trial;

3. AS TO ALL CAUSES OF ACTION AGAINST DEFENDANTS IRWIN AND DOES XVI THROUGH XXX:

Plaintiff prays to be made whole with respect to all lost wages and benefits as well as each term, condition and entitlement of employment with Defendant Irwin but for Irwin's illegal termination of his employment from the date of his termination forward, including but not limited to all front and back pay, retirement/pension, and medical benefits, together with prejudgment interest thereon in an amount subject to proof at the time of trial;

4. AS TO THE FIRST AND SECOND CAUSES OF ACTION AGAINST ALL DEFENDANTS:

Plaintiff prays for general, compensatory and punitive damages according to proof in an amount to be established at the time of trial;

5. AS TO THE THIRD, FOURTH, FIFTH AND SIXTH CAUSES OF ACTION AGAINST DEFENDANTS CHEVRON AND DOES I THROUGH XV:

Plaintiff prays for general, compensatory and punitive damages as permitted by law according to proof in an amount to be established at the time of trial;

6. AS TO THE FIRST, SECOND AND THIRD CAUSES OF ACTION AGAINST ALL DEFENDANTS:

Plaintiff prays for an award of reasonable attorneys' fees;

7. AS TO THE FIFTH CAUSE OF ACTION AGAINST DEFENDANT CHEVRON:

Plaintiff prays for an award of reasonable attorneys' fees as permitted by law;

9. OTHER RELIEF:

Costs of suit, prejudgment interest as permitted by law, together with such other and further relief as this Court deems just and proper.

Dated: April 8, 1997

Respectfully submitted,

SIEVERS & MINSKY

By /s/ L. Minsky
LARRY MINSKY
Attorney for Plaintiff
MARIO ECHAZABAL

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury on all of the issued plead herein so triable and as otherwise permitted by law.

Dated: April 8, 1997

Respectfully submitted,

SIEVERS & MINSKY

By /s/ L. Minsky
LARRY MINSKY
Attorney for Plaintiff
MARIO ECHAZABAL

[DEFENDANT CHEVRON'S ANSWER TO FIRST AMENDED COMPLAINT]

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

[Title omitted in printing]

CHEVRON'S ANSWER TO ECHAZABAL'S FIRST AMENDED COMPLAINT

[Filed May 2, 1997]

To Plaintiff And Counsel:

Defendant Chevron U.S.A. Inc. ("Chevron") answers the First Amended Complaint of plaintiff Mario Echazabal as follows:

1. Chevron denies the material allegations of Echazabal's First Amended Complaint pursuant to C.C.P. § 431.30. Chevron denies that Echazabal suffered, or will suffer, damages as a result of any act or omission by Chevron as alleged in the First Amended Complaint.

FIRST AFFIRMATIVE DEFENSE
(Failure to Mitigate)

2. Chevron is not liable for any damages Echazabal could have prevented through reasonable measures available to him.

SECOND AFFIRMATIVE DEFENSE
(Privilege)

3. Assuming *arguendo* that Chevron interfered with Echazabal's contractual relations, its acts or omissions were privileged.

THIRD AFFIRMATIVE DEFENSE
(Health and Safety)

4. Chevron is not liable to Echazabal because, as a result of his medical condition, he could not perform his essential duties without endangering the health and safety of himself and his coworkers.

FOURTH AFFIRMATIVE DEFENSE
(Justification)

5. Assuming *arguendo* that Chevron breached Echazabal's right to privacy, any invasion was justified because it substantially furthered one or more countervailing interests.

FIFTH AFFIRMATIVE DEFENSE
(Business Necessity)

6. Chevron is not liable to Echazabal because its job selection criteria are job-related and consistent with business necessity, and Echazabal cannot perform his job in the refinery environment without seriously endangering his own health.

SIXTH AFFIRMATIVE DEFENSE
(Statutes of Limitation)

7. Echazabal's claims are barred by C.C.P. §§ 339 and 340, Cal. Gov. Code §§ 12960 and 12965, and 42 U.S.C. § 2000e-5.

SEVENTH AFFIRMATIVE DEFENSE
(Unconstitutionality of Punitive Damages)

8. Any award of punitive damages is in violation of the California and federal constitutions.

EIGHTH AFFIRMATIVE DEFENSE
(Damages Limitations)

9. The damages recoverable on Echazabal's claims are limited by 42 U.S.C.A § 1981a and Cal. Civ. Code § 56.35.

Chevron prays for judgment as follows:

(1) That Echazabal takes nothing by reason of his First Amended Complaint;

(2) that Chevron be awarded costs of suit; and

(3) for any further relief the Court deems just and proper.

May 2, 1997

HAWKINS, SCHNABEL, LINDAHL & BECK

By: /s/ KG
Kurt G. Gresenz, Attorneys for Defendant
CHEVRON U.S.A. INC.

[DECLARATIONS IN SUPPORT OF CHEVRON'S MOTION FOR SUMMARY JUDGMENT]

DECLARATION OF JULIE L. CLAYDON

I, Julie L. Claydon, declare:

1. I am employed by Chevron Products Company as a safety technician. I work at Chevron's El Segundo refinery. I have been employed by Chevron since September 1990. The following matters are true of my own personal knowledge and if I was called as a witness I could competently testify to them.

2. My duties as a safety technician include record keeping for the safety section. In this capacity I maintain a database of chemicals used and stored at the refinery. The various sections at the refinery update me when new chemicals are introduced to the refinery and when existing chemicals are discontinued. This information is then inputted to our system.

3. In late May or early June 1996 I was asked to print a list of all chemicals at the refinery from 1992 through 1996, sorted by their work location. I requested the help of a systems administrator, who was able to search the database for the selected categories. Attached as Exhibit 22 is a true and correct copy of this chemical inventory. The left-hand column reflects the location at the refinery where the chemical is used or stored. The next column identifies the chemical. The "Start Date" column reflects when the chemical was first introduced to the refinery. The "End Date" column reflects when the chemical was discontinued. If there is no end date, the chemical is still used or stored at the refinery.

4. I declare under penalty of perjury under the laws of the State of California that the preceding matters are true and correct of my own personal knowledge.

Executed this 21 day of August, 1997, in El Segundo, California.

/s/ Julie L. Claydon
Julie L. Claydon

DECLARATION OF MICHAEL J. NYEHOLT

I, Michael J. Nyeholt, declare:

1. I am employed by Chevron Products Company at the El Segundo refinery. I started with Chevron in 1969 and have been working at the Chevron refinery in El Segundo since 1974. The following is true of my own personal knowledge, and if called as a witness I could competently testify to these matters.

2. I currently hold the position of industrial hygienist in the Environmental, Fire and Safety division at the Chevron El Segundo refinery. I started in that position in August 1996. My job duties include monitoring for harmful airborne exposures that an employee or contractor might encounter in the regular course of operations. One of the purposes of the monitoring is to help provide a safe working environment. The monitoring is generally for typical exposures to employees in the workplace.

3. We conduct these tests refinery-wide. We perform two kinds of monitoring: area monitoring and personal monitoring. An area sample involves placing the testing device in a stationary position and monitoring for exposures in that area. A personal sample involves affixing the testing device to a worker and monitoring for exposures he or she encounters in the performance of his or her duties.

4. I am responsible for conducting the monitoring and maintaining the results. We maintain the monitoring results in

a computer database and are required to keep the results for 30 years. I was asked to print copies of our air monitoring results from 1992 through 1996. A true and correct copy of these results are attached as Exhibit 18. Each test identifies, in the first column, the sample number, the date of the test, whether it is an area or personal sample, a description of the task being performed, the refinery location (by division, and if applicable, the plant within the division where the test took place) and the tester's description and/or comments concerning the test. The second column identifies the substance tested for ("contaminant") and the results of the test ("conc. result"). The third column lists the permissible exposure.

5. For example, the second to the last sample on page 22 of Exhibit 18 translates as follows: It is sample number 262116, performed on 10/10/93, and is a personal sample. The job tested was that of a welder removing a lead lining on a flash vessel in a specific plant in the coker unit. The test was for lead exposure. An exposure of 210 micrograms per cubic meter of air was measured. The permissible exposure to lead is 50 micrograms per cubic meter of air. Thus, for this sample, the exposure exceeded the permissible exposure by more than 4 times. I am informed and believe that lead is a chemical dangerous to the liver.

6. I declare under penalty of perjury under the laws of the state of California that the preceding is true and correct of my own personal knowledge.

Executed on August 21, 1997, in El Segundo, California.

/s/ Michael J. Nyeholt
Michael J. Nyeholt

DECLARATION OF PATRICK W. BEATTY

I, Patrick W. Beatty, declare:

1. I am employed by Chevron Research and Technology Company as a staff toxicologist. My job title is Team Leader – Petroleum Toxicology and Health Risk Assessment. I have been employed by Chevron since 1988 (in various operating divisions). The following matters are true of my own personal knowledge and if I was called as a witness I could competently testify to them.

2. I received an A.B. degree in Chemistry in 1972 from Transylvania University in Lexington, Kentucky. I received a Ph.D. in Bio-Chemistry in 1977 from Vanderbilt University in Nashville, Tennessee. I did post-doctoral research in the department of bio-chemistry and bio-physics for two and a half years at Oregon State University in Corvallis, Oregon, from 1977 to 1979. I am also a Diplomate of the American Board of Toxicology, certified in 1994.

3. As a staff toxicologist, I provide consultation to Chevron companies and operating division regarding the evaluation of potential health effects to Chevron employees, customers and the general public arising from Chevron products and processes. I have prepared a list of chemicals known to cause hepatotoxicity which exist in a petroleum refinery environment. A true and accurate copy of this list is attached as Exhibit 19. I put together this list by consulting standard toxicological reference works and text books, and reviewing a literature search of medical and toxicological literature relevant to hepatotoxicity.

4. After completing this list, I provided it to our industrial hygiene department and asked them to cross-reference my list against the chemical inventory of Chevron's El Segundo refinery (Exhibit 22). The industrial hygiene department was asked to identify all substances at the refinery containing one or more of the hepatotoxic chemicals I listed on Exhibit 19. The

industrial hygiene department provided me with their results, I reviewed them and deleted from their list those substances which I did not consider to pose a realistic hepatotoxic risk in the refinery environment. A true and accurate copy of my final list is attached as Exhibit 20.

5. I declare under penalty of perjury under the laws of the State of California that the preceding matters are true and correct of may own personal knowledge.

Executed this 2d day of September, 1997, in Richmond, California.

/s/ Patrick W. Beatty
Patrick W. Beatty

◆

DECLARATION OF WILLIAM L. SANER

I, William L. Saner, declare:

1. I am employed by Chevron U.S.A. Products Company as the Manager of Human Resources at the El Segundo refinery. I have held that position since June 1, 1993. My duties include coordinating and administering all hiring for the El Segundo refinery, providing management support and day-to-day supervision to all Human Resources staff.

2. I supervise the Human Resources staff which provides records retention in connection with job applications and related documents which are kept in the normal course of business related to hiring at the El Segundo refinery and am familiar with our procedures. The exhibits referenced in this declaration are business records maintained in the ordinary course of our operations.

3. Attached as Exhibit 1 is a true and accurate copy of Chevron job bulletin no. 1595, dated September 29, 1995, listing job openings for plant helper positions at the refinery. Attached as Exhibit 2 is a true and accurate copy of the employment application received from Mario Echazabal dated October 11, 1995. Among other things, it indicates that Mr. Echazabal was seeking employment as a Plant Helper - 3C.

4. On or about December 28, 1995, I authorized an offer of employment to be extended to Mr. Echazabal as a plant helper subject to certain conditions. Attached as Exhibit 3 is a true and accurate copy of our December 28, 1995 letter to Mr. Echazabal confirming our verbal offer and its conditions. Mr. Echazabal was advised that the offer of employment was "contingent upon . . . completing a pre-employment physical examination."

5. Attached as Exhibit 4 is a true and accurate copy of the Request for Medical Services form generated in connection with Mr. Echazabal's exam. Most notably, with respect to Medical Classification, the examining physician, Dr. McGill, checked the box for "B. Work Limitations Required." Dr. McGill wrote-in by hand the following notations: "because of uncorrectable abnormality" and "No exposure to solvents or other liver toxic chemicals."

6. I discussed Mr. Echazabal's offer with Dr. McGill and he advised me that, because of a medical condition, Mr. Echazabal should not be exposed to the hydrocarbons and other chemicals to which he would be routinely exposed if he were working as a plant helper at the refinery.

7. Attached as Exhibit 16 is a true and accurate copy of our Job Summary (form GO-400) for the positions of Coke Handler, Coker Plant Helper 1/C, 2/C, 3/C. It covers the position for which Mr. Echazabal applied. The Job Summary describes key job responsibilities. The accompanying Physical/Environmental Demands (form GO-308-ES), a true

and accurate copy of which is attached as Exhibit 17, also reviews what abilities/demands are placed on the employee and documents the airborne contaminants and chemicals in the work environment. These are noted for this position to be "Hydrocarbon Liquids & Vapors, Acid, Caustic, Refinery Waste Water and Sludge, Petroleum Solvents, Oils, Greases, Chlorine Bleach."

8. Given my knowledge of the plant helper position, and my review of the Job Summary and Physical/Environmental Demands forms, I knew that exposure to hydrocarbons and chemicals is a necessary and inseparable part of the job. Based on this knowledge and Dr. McGill's medical opinion that these exposures would be detrimental to Mr. Echazabal's health, I withdrew Chevron's job offer to Mr. Echazabal.

9. Attached as Exhibit 5 is a true and accurate copy of my February 6, 1996 letter to Mr. Echazabal. My letter communicated to him that the results of his medical examination indicated he had a medical condition which would restrict him from performing the tasks of the position we had conditionally offered to him and that we were withdrawing that offer of employment.

10. I was advised that Mr. Echazabal was employed by Irwin Industries, Inc. ("Irwin"), a contractor who provides certain services at Chevron's El Segundo refinery, and had been assigned by Irwin to work at the refinery. Given our medical evaluation that Mr. Echazabal should not be working in an environment where he would be exposed to hydrocarbons and chemicals of the type routinely encountered at the refinery, it was my judgment that we request Irwin to remove him from the refinery or place him in a position that would eliminate his exposure to solvents and chemicals. Chevron's February 21, 1996 letter to Irwin, a true and accurate copy of which is attached as Exhibit 6, was sent under my direction. We advised Irwin that we had withdrawn our job offer to Mr. Echazabal based on a medical condition that restricted him from

performing the tasks of the position offered, and that the restriction required that he not be exposed to solvents and certain chemicals. This letter also asks that Mr. Echazabal be immediately removed from the refinery or placed in a position that would eliminate his exposure to solvents/chemicals. I did this to protect Mr. Echazabal based on my belief that the work environment posed a significant risk of causing him substantial harm. It was not my intention that Echazabal lose his job at Irwin. Rather, I expected Irwin would likely transfer him to another location that did not pose the same health hazards.

11. There is no way to modify the work environment at the El Segundo refinery to eliminate a plant helper's exposure to hydrocarbons, chemicals and solvents. Nor do I see any possible way to modify the job duties of a plant helper to eliminate such exposures. This is especially true for an entry-level plant helper who is charged with much of the cleaning and maintenance responsibilities. It is a necessary and inherent part of the job duties of a plant helper to work in areas of the refinery which necessarily expose a plant helper to vapors and chemicals, including those which I am informed and believe are liver toxic.

12. Attached as Exhibit 25 is a true and correct copy of an Authorization For Release For Medical And Other Information (form GO-153). This form includes a release which provides as follows:

> I authorize the release of any and all information related to any diagnosis, treatment, and prognosis of my physical and mental condition, including information concerning the use of drugs or alcohol, by and between my healthcare providers, pharmacy, the Company, the Company's employee benefit plan administrators, any insurers of the Company's employee benefit plans or of its compliance with industrial injury or occupational safety and health laws, any organization retained by the Company to assist in the administration of its employee benefit plans or its compliance with industrial injury or occupational safety and health laws, and any other private or governmental entity from whom I am or may be entitled to benefits. I further authorize the release of any other information by and between the above-named parties related to any benefits I may be entitled to other than from the Company. This shall include, but not be limited to, all information concerning any fact or upon which such benefits are based. Information I am releasing shall be used to administer the Company's employee benefit plans, scheduled returns to work, and comply with industrial injury and occupational safety and health laws. This authorization is valid for two years from the date I sign it, or until you and my employer receive written notification of its revocation. A copy of this authorization is as valid as the original.

This form was signed by Mr. Echazabal on January 2, 1996. (It is identical to an authorization signed by Mr. Echazabal in 1993 in connection with an earlier application for employment with Chevron, a true and accurate copy of which is attached as Exhibit 24.) I am informed and believe that at the time Mr. Echazabal executed the authorization, he was employed by Irwin, an entity from which he was receiving benefits.

13. I did not release any information regarding Mr. Echazabal's medical condition or its significance to Irwin, or any agent or employee of Irwin, other than the information communicated in my February 21, 1996 letter. To the best of my knowledge and belief, no other Chevron employee has done so either. The information in my letter relevant to Mr. Echazabal's medical condition was my statement that he had a "medical condition" imposing the work restriction that he not be exposed to "solvents and certain chemicals."

14. Mr. Echazabal never became a Chevron employee. His conditional job offer was withdrawn based on our finding that Mr. Echazabal could not perform the essential functions of a plant helper without subjecting himself to a significant risk of substantial harm, a risk that could not be eliminated through reasonable accommodation.

15. I declare under penalty of perjury that the foregoing is true and correct and that, if called as a witness, I could and would competently testify to the above.

Executed August 21, 1997 at El Segundo, California.

/s/ William L. Saner
William L. Saner

DECLARATION OF KENNETH McGILL, M.D.

I, Kenneth McGill, M.D., declare:

1. I am a self-employed medical doctor working at the medical clinic at Chevron's El Segundo Refinery.

2. I graduated from the University of Saskatchewan in 1954 with a Bachelor of Arts degree in Engineering and Arts. I graduated from the University of British Columbia Medical School with an M.D. degree in 1960.

3. I did an internship and residency at St. Mary's Hospital in Long Beach from 1960 through 1962. My residency was rotating and included emergency care. I have also subsequently attended numerous professional seminars and conferences to continue my medical training. I have been licensed to practice medicine in California continuously since 1962.

4. From 1962 through 1980 I was self-employed and had a general and family medical practice in South Laguna, California. From 1980 through approximately 1986 I practiced industrial medicine working at various industrial clinics in Southern California. Industrial medicine includes treating injuries which occur on the job and biomedical testing for exposures to various chemicals and substances in the work-place. It includes such diverse things as treating chemical exposures, testing for hearing loss and treating accidents on the job. From approximately 1986 through approximately 1989 I worked as a medical doctor for the City of Los Angeles Department of Water & Power. I was the doctor on staff at the Water & Power clinic. Since approximately January 1988 I have worked at the Chevron El Segundo Refinery in the medical clinic. Since approximately July 1993 I have been the Clinical Doctor.

5. As Clinician at the El Segundo Refinery I am concerned both with treating injuries and accidents once they occur and, just as importantly, developing and implementing programs for the prevention of injuries.

6. One of my functions is to give pre-employment physical exams and assess applicants for employment at the refinery from a medical standpoint. This function typically includes taking a history from the applicant, assessing whether any past or current medical problems are likely to have an impact on what they will be asked to do and/or what they will be exposed to in the workplace and, when appropriate, investigating further to determine their ability to safely perform the position for which they are being considered. One of the things I take into account is whether the job the applicant is seeking is likely to aggravate a condition the person already has. For example, if an applicant has pre-existing pulmonary problems or allergies, we have to very carefully examine whether it would be appropriate to put that person in an environment where they are exposed to dust.

7. In the normal course of business the medical clinic maintains medical charts which record medical examinations, assessments and/or treatment of persons seen in the clinic. Mr. Echazabal was seen at the clinic several times between 1992 and 1996. Pursuant to our standard practice we maintained a chart concerning Mr. Echazabal. I reviewed that chart. Included in it are subsequent records concerning his chronic active hepatitis C. I personally saw Mr. Echazabal on some occasions, including January 2, 1996, when he came to the clinic, gave a medical history and underwent a physical examination as part of the employment process. Attached as Exhibit 15 is a true and accurate copy of the Medical History & Physical Examination form (GO-146) filled out at Mr. Echazabal's January 2, 1996 visit. Mr. Echazabal disclosed in connection with the Medications inquiry that within the last twelve months he had taken Interferon for a liver condition. In connection with his Exposure History he answered "Yes" to questions about whether he had been regularly exposed to insulation materials, welding and soldering fumes and other dusts and fumes within the last six months. He specifically identified exposure to "coker dusts." Mr. Echazabal also indicated that with respect to chemical agents, he had been exposed to solvents and cleaning fluids. Also, he had been exposed to engine exhaust and noise. Mr. Echazabal reported that all of these exposures were at work. Mr. Echazabal also answered "yes" to questions inquiring about a history of hepatitis or jaundice. He disclosed both that he had a liver condition and was undergoing liver treatment. My notes in connection with my January 2, 1996 examination indicate that Mr. Echazabal was to set-up an appointment for a current liver function test at his HMO. The purpose of this was to assist me in assessing his current liver function.

8. The refinery creates and maintains job summaries with respect to every position at the El Segundo Refinery. These include descriptions of what employees need to be able to do in particular jobs and, where appropriate, what environmental

conditions they will encounter. I knew Mr. Echazabal was applying for a position to become a coker plant helper so from our manual I obtained the summaries regarding that position. A true and accurate copy of the applicable Job Summary (Form GO-400) is attached as Exhibit 16. A true and accurate copy of Chevron's Physical/Environmental Demands (form GO-308-ES) is attached as Exhibit 17. These summaries are prepared in the normal course of business and are used and relied upon by the medical clinic in connection with assessing whether applicants for jobs are capable of safely performing the required functions. The information in these two summaries were consistent with my general understanding and enhanced my knowledge of the coker plant helper position and its requirements. In particular, the Physical/Environmental Demands (form GO-308-ES), which was updated on December 1, 1993, addressed the issue of Airborne Contaminants & Chemicals in the work environment, listing: "Hydrocarbon Liquids & Vapors, Acid, Caustic, Refinery, Waste, Water and Sludge, Petroleum, Solvents, Oils, Greases, Chlorine, Bleach." Given Mr. Echazabal's medical history, his impaired liver function as evidenced by lab tests in his chart and his diagnosis of chronic active Hepatitis C, I was concerned about whether he could work in the environment at the coker unit and provide the services required of a plant helper without endangering his own health. A plant helper in the coker unit is exposed to chemicals and solvents including several that are hepatotoxic, that is, damaging to the liver. A healthy individual can be expected to withstand this exposure with no significant health risk. But given Mr. Echazabal's history of a long term liver problem, his diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes over a period of years, he had a reduced liver function as demonstrated by lab test results, he would be far more at risk than a person who had normal liver function and was performing the duties of a plant helper. My concern was that further exposure to hepatotoxic chemicals and solvents would further damage his already reduced liver capacity and seriously endanger his health. Small exposures over a long

period of time would pose a health hazard for him. Also, a single event large exposure (for example, as a result of a ruptured pipe, a relief valve popping and venting, a fire, explosion or other emergency situation) could by itself significantly injure him and potentially cause death. In short, hepatotoxic exposure to a person like Mr. Echazabal with an already impaired liver suffering from a progressive liver disease such as chronic active hepatitis C could be fatal. One of the liver's primary functions is to filter poisonous substances from the body. Given the existence of numerous potential toxic substances at the refinery, even if not specifically liver toxic, a person with an impaired liver would be less able to detoxify such an exposure. This circumstance by itself carries the risk of serous injury or death.

9. I received a letter dated January 10, 1996 from Zelman Weingarten, M.D., one of Mr. Echazabal's personal physicians. A true and correct copy of this letter is attached as Exhibit 27. It advises that Mr. Echazabal had been followed in the GI/Hepatology Department of Healthcare Partners Medical Group for several years with a history of chronic active Hepatitis secondary to Hepatitis C, and that he had been treated for extended periods with Interferon without clearance of the problem. Mr. Echazabal was described at that time as being asymptomatic. Dr. Weingarten advised that Mr. Echazabal did not pose a contagious problem, provided he did not donate blood, use needles, etc. I was concerned about whether his chronic active Hepatitis C would affect his ability to work as a plant helper in the coker unit without injuring himself as a result of exposures to chemicals and solvents. Dr. Weingarten's letter did not address this additional issue.

10. Attached as Exhibit 28 is a true and accurate copy of my January 10, 1996 letter to Mordo Suchov, M.D., whom I knew to be one of his treating doctors at the Healthcare Partners Medical Group. I advised Dr. Suchov, among other things, that Mr. Echazabal had applied for a job that may entail exposure to

hepatotoxic hydrocarbons and asked his opinion as to whether this exposure would be a risk to Mr. Echazabal's liver condition.

11. On January 24, 1996 I received a partial printout of blood tests results which I believe Mr. Echazabal brought into the clinic that day. A copy of that partial printout is attached as Exhibit 14. It reports tests on blood drawn on 1/5/96. The copy I was given did not go all the way to the bottom of the page and did not include the particular liver function tests I was interested in. On that date, I placed a phone call directly to the laboratory and spoke with a technician, my notes show he gave his name as Fred, who read me the additional test results that were not on the page I was provided. I was advised on that date, and noted in my chart, the following lab results:

SGPT	329
SGOT	147
GGTP	170
Alpt	90

These results were markedly abnormal. These each show liver enzymes at values far above normal. These enzymes are intracellular enzymes which indicate liver cell damage. There is a normal range for these enzymes indicating normal clearance of liver cells. These results, however, combined with Mr. Echazabal's history, show that his liver has already suffered significant damage. A normal healthy adult may only routinely need to use 50-60% of their liver capacity and has, in effect, excess capacity. Mr. Echazabal has a greatly decreased capacity to process toxins. Additionally, exposure specifically to hepatotoxins will further impair his already damaged liver and damage his health by continuing to degrade his liver's ability to function. Given that his liver is already in effect impaired the prospect of further damage is quite serious and must be avoided.

12. From our chart we also had prior lab results regarding Mr. Echazabal which I was able to review and compare. A true and accurate copy of a report dated October 15, 1992 is attached as Exhibit 7. It shows:

			Reference Range
G-Glutamyl Transpep	167.0	Units/L	1.00-94.0
Transaminase, SGO	118.0	IV/L	1.00-45.0
Transaminase, SGP	275.0	IV/L	1.00-60.0

On or about December 19, 1992, I received a letter from one of Mr. Echazabal's physicians, a true and correct copy of which is attached as Exhibit 8, which reports the following results:

G-Glutamyl Transpep	39.0
Transaminase, SGO	108.0
Transaminase, SGP	129.0

A true and accurate copy of a report dated January 6, 1993 is attached as Exhibit 9. It has the following information:

			Reference Range
G-Glutamyl Transpep	142.0	Units/L	1.00-94.0
Transaminase, SGO	212.0	IV/L	1.00-45.0
Transaminase, SGP	469.0	IV/L	1.00-60.0

A true and accurate copy of another report dated March 26, 1993 is attached as Exhibit 10. It shows:

			Reference Range
GGT	185	U/L	0-65
AST (SGOT)	145	U/L	0-50
ALT (SGPT)	406	U/L	0-55

On or about April 5, 1993, I received another letter from one of Mr. Echazabal's physicians, a true and correct copy of which is attached as Exhibit 11, with the following results:

GGT	181
SGOT	177
SGPT	494

A true and accurate copy of another lab report dated April 9, 1993, is attached as Exhibit 12. That report has the following entries:

			Reference Range
G-Glutamyl Transpep	151.0	Units/L	1.00-94.0
Transaminase, SGO	120.0	IV/L	1.00-45.0
Transaminase, SGP	265.0	IV/L	1.00-60.0

A true and accurate copy of a report dated June 25, 1993 is attached as Exhibit 13. For the equivalent items it showed:

			Reference Range
GGT	161	U/L	0-65
AST (SGOT)	214	U/L	0-50
ALT (SGPT)	513	U/L	0-55

13. Based on my review of Mr. Echazabal's medical chart, his prior lab results and the more recent report regarding blood taken on January 5, 1996, I noted that despite a history of having received aggressive Interferon treatment for a period of years, the liver enzyme levels still showed considerable impairment in liver function.

14. It is my professional opinion to a reasonable degree of medical certainty that Mr. Echazabal's chronic liver condition is uncorrectable. Based on my knowledge of the job requirements of plant helper in the coker unit, it was and remains my medical opinion that Mr. Echazabal could not safely perform that job. Working in that environment would present a danger to Mr. Echazabal and would potentially damage his liver and endanger his health to a significant degree. It was and remains my opinion that Mr. Echazabal should not be put in a position where he is working with solvents or other liver toxic chemicals. Based on my knowledge of the requirements of a plant helper in the coker unit, he should not be hired to perform that job. In fact, any job out in the refinery that exposed him to hydrocarbons, chemicals and solvents would not be appropriate. It was and remains my opinion that Mr. Echazabal faced a significant risk of substantial harm in the position conditionally offered to him. I am advised that Mr. Echazabal had worked for many years for Irwin Industries (and before that other employers) at the Chevron El Segundo Refinery. I have considered this fact, as well as his failure to respond to aggressive Interferon treatment, in reaching my opinion that it would pose a significant health risk for him to continue working around hepatotoxic chemicals and solvents.

15. On January 29, 1996 I also discussed this issue by telephone with Dr. T.L. Bridge, Chevron's Medical Director in San Francisco. He agreed with my assessment that Mr. Echazabal could not safely work as a plant helper at the refinery. Thereafter I discussed this issue with William Saner,

head of Human Resources at the refinery, and provided him my assessment.

16. On January 29, 1996 I completed the bottom half of the REQUEST FOR MEDICAL SERVICE report, a true and accurate copy of which is attached as Exhibit 4. As noted on the form, if Mr. Echazabal were to be hired by Chevron, it would be subject to the work limitation imposed as a result of his uncorrectable abnormality. The work limitation was that there should be "no exposure to solvents or liver toxic chemicals." Thereafter I discussed this issue with William Saner, head of Human Resources at the refinery.

17. I received a letter dated February 28, 1996 from Mr. Echazabal's doctor, Zelman Weingarten, M.D., dated February 28, 1996. A true and accurate copy of that letter is attached as Exhibit 29. Dr. Weingarten noted that in a prior letter I had mentioned that Mr. Echazabal had applied for a job that "may entail exposure to hepatotoxic hydrocarbons." Dr. Weingarten's letter advised that, "this, of course, is recommended not to be the case." In short, Mr. Echazabal's own personal doctor concurred in my assessment that Mr. Echazabal should not be in a job involving exposure to hepatotoxic chemicals and solvents. This reinforced my earlier opinion.

18. Based on my knowledge of the job requirements of a plant helper in the coker unit and what they actually do on the job, I see no way to modify the essential duties of the position, or otherwise accommodate Mr. Echazabal, so that he could safely perform these functions. Working in that environment is a necessary and inherent part of the job. Because of Mr. Echazabal's impaired liver function, he cannot work in that environment without significantly endangering his health.

19. At no time did I provide any of Mr. Echazabal's medical records to Irwin or its agents. Nor am I aware of anyone at the medical clinic having done so. I have also reviewed our chart regarding Mr. Echazabal. Had we provided any of his medical

records to anyone, there would be a notation or cover letter reflecting this fact in the chart pursuant to our custom and practice in the clinic. For example, my communications with Mr. Echazabal's treating physicians in the course of my assessment of his condition are all documented in the file (some of which are attached as exhibits to this motion). There is no record of any disclosure or communication between the clinic and Irwin.

I declare under penalty of perjury that the foregoing is true and correct and that, if called as a witness, I could and would competently testify to the above. Executed this 25th day of August, 1997 at El Segundo, California.

/s/ Kenneth McGill, M.D.
Kenneth McGill, M.D.

DECLARATION OF RON DIPADUA

I, Ron Di Padua, declare:

1. I am employed at the Chevron El Segundo Refinery as a Shift Supervisor in the Coker/Sulfur Acid Division, also referred to as the coker unit. During my shift, I am responsible for the day-to-day activities in my unit including supervising the personnel who work there.

2. The plant helper hired for the coker unit in January 1996 would be working under my supervision if assigned to my crew, or under the supervision of another shift supervisor if the was assigned to another crew.

3. One function of the coker unit is to thermally crack residium and extract distillates from it. The coker unit has three

furnaces and six coke drums. They are involved in a batch process with three drums typically being filled while the other three are in the recovery/cooling process for preparation of removal. The coke drums are large, permanently installed pressure vessels (approximately 27 feet in diameter and 97 feet tall). Residium is heated to between 550 degrees F to 915 degrees F and pumped into the coke drums. Under pressure and heat the residium is fractionized. Distillates are separated out and taken away. Corrosion inhibitors are added in the distillation section. This includes Nalco 5163 Corrosion Inhibitor and Nalco 5186 Corrosion Inhibitor. Nalco 5743 process Antifoam is injected into the coke drums while they are feeding towards the end of the feeding cycle. Hydrocarbons distilled from the coke include thermocracked naptha heavy, naptha light, and naptha sour. Sour water and other recyclable oils are also byproducts of the process.

4. One of our goals is to minimize leakage to the environment. But some weepage and escape of these chemicals and/or hydrocarbons occurs, in particular at flanges, block valves and flow valves. Air monitors regularly check for leaks. When a small leak is suspected the operators use Snoop Liquid Leak Detector to locate leaks. Plant helpers are not directly involved in these operations. But they are working in and around the area where these chemicals are stored and used and are occasionally exposed to leakage. There is also a risk of a major event, e.g., major leak, fire or explosion. These occur only very infrequently but can result in a plant helper in the coker unit having major exposure to the chemicals and products used and produced in these operations.

5. Once the thermocracking and distillation process in a particular coke drum has run its course, the next steps are to cool it, open the drum and empty the coke so the process can resume. Cooling involves flushing the still sealed coke drum with water. The water is drained and, as a result of having mixed with the coke and petroleum product in the drum,

contains contaminants such as manganese. While the coke drum is draining, plant helpers are directly involved in removing the heads, top and bottom, from the coke drums. This includes using an impact gun to remove bolts fastening the heads. They commonly may need to use products called Rust Buster or Master Mechanic (like a heavier duty version of WD40) to spray onto the bolts to loosen stuck bolts on the heads. As the heads are being removed and continuing thereafter, the plant helpers are exposed to steam coming off the petroleum coke containing 10-12% VCM (volatile combustible matter). The steam contains small amount of contaminants which it picked up from the coke. One of the plant helpers (called the driller) then uses a high pressure water spray (approximately 2,500 lbs/sq inch) to actually cut the coke that is in the now opened coke drum. The driller drills or cuts through it so that it falls out of the drum and into an open coke pit. Sometimes the plant helper hits a "hot spot" and steam and coke fines blow back up to the top deck where he is working. Mixed in with the coke is also small amounts of lead, iron, manganese, selenium and other substances. Plant helpers also clean the heads, inlet lines, deck and associated equipment. The plant helper will also grease valves and start resealing the drum heads. This activity commonly requires th. plant helper to use "plumbers dope," and various greases and oils to make it easier to thread flanges and bolts. A plant helper will commonly mix plumber's dope with SS Jet Lube or GS68 oil and apply this to flanges and bolts.

6. Plant helpers are also involved in using a crane to lift coke out of the coke pit and put it on a conveyor belt which carries the coke to another area for loading onto trucks to be taken away from the refinery. A plant helper is typically assigned to monitor the conveyor belt and clean up when coke falls off the belt. Once the coke is cut out of the drums, it is open to the environment and plant helpers are exposed to coke dust.

7. When open-topped trucks are used to transport the coke, a solution including Corexit is automatically sprayed onto the load to suppress dust while the coke is being trucked.

8. From time to time we also halt processing operations and have a shutdown to allow maintenance or modifications to occur. During shutdowns there is typically a lot of welding going on in the unit. A plant helper working in the coke unit would necessarily be exposed to welding fumes when he is working nearby or downwind.

9. Plant helpers also use GS220 oil on gear boxes and winch motors, GS68 oil on joy motors, Quindlubic 822 oil for operating chutes, actuators and rams, and Duralith NLG1 #2 Grease for primary crusher and rollers on the belts as well as for greasing the crane bucket.

10. There is no way to perform the functions of a plant helper without being exposed to this environment including hydrocarbons, chemicals and solvents. Exposures to some of these substances arises from plant helpers using them directly. Additional exposure results from being in a work area when others are using them. I am informed and believe, based on a review of the Declaration of Kenneth McGill, M.D., which is being filed with the court together with this declaration, that a healthy individual can be expected to withstand this exposure with no significant health risk. But a person with a long term liver problem, a diagnosis of chronic active Hepatitis C and reduced liver function would be far more at risk than a person who had normal liver function and was performing the duties of a plant helper.

11. I have reviewed the Job Summary (Form GO-400) for the Coke Handler; Coker Plant Helper 1/C, 2/C, 3/C and the Physical/Environmental Demands (Form GO-308-ES), it accurately describes the plant helper position.

I declare that the foregoing is true under penalty of perjury and, if called as a witness, I could and would testify to the

above based on my own personal knowledge, except where I have indicated I am relying on information and belief. Executed this 22 day of September, 1997 at El Segundo, California.

/s/ Ron DiPadua
Ron DiPadua

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DECLARATION OF DENNIS N. LEONARD

I, Dennis N. Leonard, declare:

1. I am employed by Chevron Products Company. I have worked for Chevron for the past seven and a half years, the entire time at the Chevron El Segundo refinery. My job title is Policy 530 Coordinator and I work in the Environmental, Fire and Safety division. The following matters are true of my own personal knowledge and if called as a witness I could competently testify to them.

2. Chevron is required to prepare Toxic Chemical Release Inventory reports in compliance with Section 313, Title III of the Superfund Amendments and Reauthorization Act of 1986 and the Pollution Prevention Act of 1990 ("SARA"), and filing them with the Emergency Planning and Community Right-To-Know ("ECPRA") Reporting Center and the California Environmental Protection Agency. The reports cover substances determined by the Environmental Protection Agency ("EPA") to pose environmental and/or health hazards.

3. Reporting is required to provide the public with information on the releases of listed toxic chemicals in their communities and to provide the EPA with release information to assist it in determining the need for future regulations. Facilities must report the quantities of both routine and

accidental releases of listed toxic chemicals, as well as the maximum amount of the listed toxic chemicals on-site during the calendar year and the amount contained in wastes transferred off-site. The SARA/ECPRA reports cover the emission, escape, release, transfer and disposal of the designated substances from Chevron's El Segundo refinery.

4. Under the SARA (§ 313(d)), chemicals are designated for reporting by the EPA when it determines any one of the following:

> (A) The chemical is known to cause or can reasonably be anticipated to cause significant adverse acute human health effects at concentration levels that are reasonably likely to exist beyond the facility site boundaries as a result of continuous, or frequently recurring, releases.
>
> (B) The chemical is known to cause or can reasonably be anticipated to cause in humans – (i) cancer or teratogenic effects, or (ii) serious or irreversible – (I) reproductive dysfunctions, (II) neurological disorders, (III) heritable genetic mutations, or (IV) other chronic health effects.
>
> (C) The chemical is known to cause or can reasonably be anticipated to cause, because of – (i) its toxicity, (ii) its toxicity and persistence in the environment, or (iii) its toxicity and tendency to bioaccumulate in the environment, a significant adverse effect on the environment of sufficient seriousness to warrant . . . reporting.

5. My duties include gathering the data upon which these reports are based. I get this data from the various operating divisions within the refinery. I then assist with the preparation

and submission of the SARA/ECPRA reports. My responsibilities also include filing and maintaining these reports internally at the refinery. Attached as Exhibit 21 are true and correct copies of Chevron's SARA/ECPRA reports for 1995, the most recent compliance period.

6. I declare under penalty of perjury under the laws of the state of California that the preceding matters are true and correct of my own personal knowledge.

Executed on August 29, 1997, in El Segundo, California.

/s/ Dennis N. Leonard
Dennis N. Leonard

[EXHIBITS IN SUPPORT OF CHEVRON'S MOTION FOR SUMMARY JUDGMENT]
[EXHIBIT 1]

BULLETIN
No. 1595

Chevron Refining
El Segundo Refinery
September 29, 1995

NOW HIRING FOR PLANT HELPER POSITIONS

TO ALL EMPLOYEES:

The Refinery is currently looking for entry level Plant Helpers for the Environmental, Fire and Security Division and the Coker-Sulfur/Acid Division.

If you know of anyone whom you would consider for a plant helper position, please have the individual read our Sunday, October 1, 1995, Classified advertisement placed in the Daily Breeze and Los Angeles Times. The advertisement gives a brief job description along with instructions on how to set an appointment to complete a job application. Candidates may start calling our job line at (310) 615-5239, on Monday, October 2, 1995.

The Classified Advertisement will read as follows:

Chevron U.S.A. Products Co.
El Segundo Refinery

Chevron U.S.A. Products Co., one of the leading oil companies in the nation, is currently seeking individuals for our El Segundo Refining facility. Refinery experience preferred.

For an appointment call (310) 615-5239 starting October 2nd through the 6th between the hours of 8:00 a.m. through 10:30 a.m. and 12:00 p.m. through 3:30 p.m. Please identify position by this number 25B or 25C when calling for your appointment.

Chevron offers an excellent salary, work environment, and benefit package including an on-site fitness center.

Must be 18 years of age and possess a valid California Driver's License. All applicants must pass a medical examination which includes drug screening.

Chevron is an Equal Opportunity Employer

PLANT HELPER-B
25B

Requirements for the job include but are not limited to: Oral and written communications necessary for basic day-to-day job functions. Must be able to work at elevated heights and climb ladders and stairs, some of which are located on towers and columns in work area. Variety of activities involving day-to-day monitoring of refinery systems. Calibrate and maintain analyzers. Work closely with operation and maintenance personnel on repair of refinery equipment.

PLANT HELPER-3C
25C

Requirements for the job include, but are not limited to: Must work rotating 12 hour shifts (including weekends and holidays due to 24 hour/7 day a week operation). Oral and written communications necessary for basic day-to-day job functions. Must be able to work at elevated heights and climb ladders and stairs, some of which are located on towers and columns in work area. Checking mechanical equipment, safety inspections of equipment, head-up and un-head large process drums. As required lubricate, service and make repairs to drilling equipment. Operate large conveyor belts and truck loading systems.

D.E. TORMEY

GMM:spd/29
Post until October 6, 1995

ALEX SLOAN
Bulletin - HRD

[EXHIBIT 3]

Chevron U.S.A. Products Company
El Segundo Refinery
324 W. El Segundo Boulevard
El Segundo, CA 90245
(310) 615-5000

December 28, 1995

Mario Echazabal
455 E. 27th St.
Los Angeles, CA 90011

Dear Mr. Echazabal:

I am pleased to confirm our verbal job offer for the Plant Helper position at the Chevron U.S.A. Products Company, El Segundo Refinery in El Segundo, California. Your starting rate would be $17.29 per hour.

Our offer of employment is contingent upon your providing Chevron with proof of your identity and eligibility to work in the United States according to the Immigration Reform and Control Act of 1986, as well as completing a **pre-employment physical examination.**

Please advise Anastasia Nakamura at (310) 615-5390 by **December 29, 1995** of your decision to accept or decline employment.

If you accept this job offer, you will need to complete a pre-employment physical examination and drug screen. Your appointment with the El Segundo Clinic has been set up for **January 2, 1996 at 9:30 a.m.** You must arrive for your appointment 15 minutes prior to the actual examination to complete the required medical forms.

We look forward to hearing from you. If there are any questions, please contact Anastasia Nakamura on (310) 615-5390.

Very truly yours,

/s/ W.L. Saner/an

———◆———

[EXHIBIT 5]

Chevron U.S.A. Products Company
El Segundo Refinery
324 W. El Segundo Boulevard
El Segundo, CA 90245
(310) 615-5000

February 6, 1996

CERTIFIED MAIL Z 046 331 528

Mr. Mario Echazabal
455 E. 27th Street
Los Angeles, CA 90011

Dear Mr. Echazabal:

We have completed the review of your pre-employment physical examination. Unfortunately, the results of your examination indicate that you have a medical condition which would restrict you from performing the tasks of the position we offered. It is therefore, with regret, that we must now withdraw our offer of employment.

The results of your recent test will be kept in confidence by Chevron's Medical Department and will not be disclosed to any

other company. If you wish to discuss the results of the physical, please contact our Medical Department on (310) 615-5259.

We wish you the very best in your future endeavors.

Sincerely,

/s/ W.L. Saner

cc'd Medical

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[EXHIBIT 6]

Chevron U.S.A. Products Company
El Segundo Refinery
324 W. El Segundo Boulevard
El Segundo, CA 90245
(310) 615-5000

February 21, 1996

CERTIFIED MAIL P 321 119 448

Irwin Industries, Inc.
2679 Redondo Ave.
Long Beach, CA 90806

Dear Mr. Bud Miller:

Your employee Mr. Mario Echazabal recently applied for employment at the Chevron U.S.A. Products Company. As a result of his application, we extended a job offer which was contingent on several conditions including his completing a physical examination. Unfortunately, the results of Mr.

Echazabal's examination indicate that he has a medical condition that would restrict him from performing the tasks of the position we offered. The restrictions require that Mr. Echazabal **not** be exposed to solvents and certain chemicals.

It is therefore, with regret, that we have withdrawn our offer of employment to Mr. Echazabal. Further, we must ask you to immediately remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals. However, should Mr. Echazabal wish to pursue further analysis of his medical condition, we may consider certain alternatives.

Please contact our Senior Contracts Administrator, Ms. Fran Hsu, on (310) 615-5534 with any questions that you may have.

Sincerely,

/s/ W.L. Saner

cc: Medical Department
Mr. Mario Echazabal

bcc: FV Hsu
JS Nakamura

[EXHIBIT 16]

Job Summary
GO-400

COKE HANDLER; COKER PLANT HELPER 1/C, 2/C, 3/C		Placement
Company CHEVRON U.S.A. PRODUCTS COMPANY		Placement Approved By
Department/Division Refining/Operations	Location El Segundo Refinery	
Job Replaced Coke Handler, Plant Helper 2/C	Date 11/5/87, 3/12/83	
Reporting		
Reports to Support Supervisor		Placement 3B
Supervisor Functions	Provides coaching and leadership to ensure assigned area is achieving maximum results. Supports crew to remove hurdles, troubleshoot problems and ensures crews are properly trained. Schedules crews, performs payroll functions and vacation scheduling.	___ Exempt ___ New Job X Non-Exempt X Rewrite ___Reappraisal X EPIC Position ID (6 digit)
Functional Help Available Refinery Process Technicians 14	Reports one of: ___ X ___ Close ___ Remote	

Functions			What the job does in concise, clear terms; how and why if necessary.
	No.	% Time	Key Job Responsibilities
			Coke Handler is qualified in and performs functions of Assignments 1, 2, and 3. Plant Helper 1/C is qualified in and performs functions of Assignment 1 and Assignment 2 or 3. Plant Helper 2/C is qualified in and performs functions of Assignment 1. Plant Helper 3/C is an entry level position.
E	1.		Assignment 1 (Driller) Receive turnover. Check mechanical equipment and coke drum situation to make sure it conforms with the turnover. As each drum is ready for coke cutting: - Witness Coke Operator vent and drain drum and verify with Operator it is safe to unhead. - With assistance from Plant Helper, unhead and prepare for cutting. - Drill and cut coke (in emergency shut down jet pump). - With Coker Operator, check gaskets and surfaces to determine that they were properly cleaned and prepared. With Plant Helper, re-head the drum. - Check interlock panel, perform safety inspection of coke cutting equipment, lubricate, service and make minor repairs as required.
E	2.		Assignment 2 (Crane Operator) Receive turnover. Check mechanical equipment and coke drum situation to make sure it conforms with the turnover. - Operate traveling crane, bucket loader and primary crusher, shifting and moving coke as required. - Assist as necessary in handling coke system problems. - Make routine safety checks of equipment. Comply with rules and regulations on use of safety equipment.

Scope	How big is the job? Use factors relative to this job only.		
Employees Supervised: _____ Exempt _____ Non-Exempt _____ Functional _____ Contract	Describe Scope 1993 Year of Data Used Performs work at the Coker Complex at the El Segundo Refinery		
Compiled by E. R. Baylor/D. K. Smith		Reviewed By	Date

COKE HANDLER; COKER PLANT HELPER 1/C, 2/C, 3/C

Job Summary
GO-400
Continued Page 2

Functions			What the job does in concise, clear terms; how and why if necessary.
	No.	% Time	Key Job Responsibilities
			Assignment 2 (Crane Operator) (continued) - Check crane panel alarms, make equipment adjustments, lubricate and make minor repairs. - Maintain cleanliness of coke pit and crane area including minor painting as necessary for upkeep and good housekeeping. - Perform other work as necessary for safe, efficient and economical coke handling.
E	3.		Assignment 3 (Conveyor Operator) Receive turnover. Check mechanical equipment in conveyor system (e.g., belts, drive motors, idler rollers, etc.) to make sure it conforms with the turnover. - Operate all conveyors including shuttle conveyor in the coke storage building. - Direct flow of coke to trucks, railroad cars or storage and load coke from the storage building to load out system. - Keep Head Operator informed of coke handling status and problems such as conveyor or crusher stoppage or coke diverted to storage facility. - Make routine checks of Allen Bradley computer, belt system panel alarms and coke truck load out computer control system. Correct and advise the Head Operator of any system problems or failures. - Operate coke truck loading system manually when automatic loading system fails and monitor coke truck dust suppressant injection rate and system.

			- Check all drive motors for proper lubrication and operation. - Clear and wash coke away from the underside of conveyor belts and clear crushers, loading chutes and belt walkways of coke build-up. - Monitor operation and equipment in water collection sumps. - Assist and relieve crane operator and perform other work for safe, efficient and economical coke handling or other work as directed, including maintenance and repair to noted facilities.

[EXHIBIT 17]

PHYSICAL/ENVIRONMENTAL DEMANDS - GO-308-ES

NAME COKE HANDLER; COKER PLANT HELPER 1/C, 2/C, 3/C DATE December 1, 1993

DIVISION Operations COMPANY/DEPARTMENT Chevron Products Co./Refining

SUMMARY:

Incumbent's key job responsibilities may include, but are not limited, to the following:
Receive turnover. Check mechanical equipment and coke drum situation to make sure it conforms with the turnover.

- As each drum is ready for coke cutting, unhead and prepare for cutting. Drill and cut coke (in emergency shut down jet pump). With Coker Operator, check gaskets and surfaces to determine that they were properly cleaned and prepared. With Plant Helper, re-head the drum. Check interlock panel, perform safety inspection of coke cutting equipment, lubricate, service and make minor repairs as required.
- Operate traveling crane, bucket loader and primary crusher, shifting and moving coke as required. Assist as necessary in handling coke system problems. Make routine safety checks of equipment. Comply with rules and regulations on use of safety equipment. Check crane panel alarms, make equipment adjustments, lubricate and make minor repairs. Maintain cleanliness of coke pit and crane area including minor painting as necessary for upkeep and good housekeeping. Perform other work as necessary for safe, efficient and economical coke handling.
- Direct flow of coke to trucks, railroad cars or storage and load coke from the storage building to load out system. Keep Head Operator informed of coke handling status and problems such as conveyor or crusher stoppage or coke diverted to storage facility. Make routine checks of Allen Bradley computer, belt system panel alarms and coke truck load out computer control system. Correct and advise the Head Operator of any

system problems or failures. Operate coke truck loading system manually when automatic loading system fails and monitor coke truck dust suppressant injection rate and system. Check all drive motors for proper lubrication & operation. Clear & wash coke away from the underside of conveyor belts & clear crushers, locating chutes and belt walkways of coke build-up.

PHYSICAL ABILITIES/ENVIRONMENTAL DEMANDS:

ABILITY/ DEMAND	Required	Not Required	ABILITY/ DEMAND	Required	Not Required
Standing	X		Wetness	X	
Walking	X		Humidity-Above 90%	X	
Sitting	X		Noise-Over 85 Decibels	X	
Stooping	X		Respirator-Breathing Apparatus	X	
Kneeling	X		Contained/Cramped Spaces	X	
Squatting	X		Elevated Heights	X	

Body Twisting	X		Working Around/With People	X	
[original illegible]	X		Working Alone	X	
Sense of Touch	X		Airborne Contaminants & Chemicals in work environment:		
Manual Dexterity	X		Hydrocarbon Liquids & Vapors, Acid, Caustic, Refinery Waste Water and Sludge, Petroleum Solvents, Oils, Greases, Chlorine Bleach		
Speaking Clearly	X				
Seeing-Distant	X				
Seeing-Reading	X				
Reaching, High, Low, Level	X				
Hearing-Speech Range	X				
Depth Perception	X				
Color Vision	X				
Lifting-Max. Weight - 50 #	X				
Carrying-Max. Weight-50 #	X				

Pushing-Max. Force - 100 #	X		
Pulling-Max. Force - 100 #	X		
Climbing-Ladders	X		
Climbing-Stairs	X		
Balancing	X		
Extreme Cold-Below 30°F		X	
Extreme Heat-Above 100°F	X		
Dryness	X		

ADDITIONAL INFORMATION:

For more information, refer to the above titled Job Summary (GO-400) located in the Human Resources Division.

Compiled By D. K. Smith/J.S. Nakamura

[EXHIBIT 20]

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION	NALCO 5163 CORROSION INHIBITOR S15747		ETHYL BENZENE C100414	15.00
			XYLENE/DIMETHYL BENZENE C1330207	7.50
			NAPHTHA (PETRO) AROMATIC-CONTG C68603087	55.00
		•	NAPHTHALENE C91203	7.50
	NALCO 5186 CORROSION INHIBITOR S28078		SOLVENT NAPHTHA, HVY AROMATIC C64742945	40.00

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION		•	NAPHTHALENE C91203	10.00
			PROPRIETARY IMIDAZOLINE S346	40.00
	NALCO 5743 PROCESS ANTIFOAM S2673		SOLVENT NAPHTHA, HVY AROMATIC C64742945	40.00
		•	NAPHTHALENE C91203	10.00
	NAPHTHA, LIGHT CPS212980		NAPHTHA, LIGHT STRAIGHT RUN C64741464	100.00
		•	BENZENE C71432	

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION	NAPHTHA, SOUR NN00005517	*	NAPHTHA, UNSWEETENED C68783120	100.00
		*	BENZENE C71432	5.00
	PHENOL CHEMETS R-8000 SERIES S25982		POTASSIUM FERRICYANIDE C13746662	0.00
			DISODIUM ETHYLENE DIAMINE TETR C139333	0.20
			SODIUM TETRAHYDROBORATE C16940662	0.00
			SODIUM CARBONATE C497198	1.00

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION			WATER C7732185	98.00
			TRIS BUFR (HYDROXYMETHYL) AMINOM C77861	0.20
			4-AMINOANTIPYRENE C83078	0.20
	SNOOP LIQUID LEAK DETECTOR S1926		ETHYLENE GLYCOL CPS310050	1.00
		*	DIETHYLENE GLYCOL C111466	1.00
			TRIETHYLENE GLYCOL C112276	98.00

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION			TETRAETHYLENE GLYCOL C112607	1.00
	SOUR WATER (AMMONIA BEARING) NN00003730	*	PHENOL C108952	1.00
			AMMONIUM HYDROXIDE C1336216	10.00
			WATER C7732185	78.00
			HYDROGEN SULFIDE (H2S) C7783064	10.00
			MERCAPTANS (MIXTURE) S42214	1.00

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION	SOUR WATER (CAUSTIC BEARING) NN00003731	*	PHENOL C108952	1.00
			SODIUM HYDROXIDE C1310732	10.00
			AMMONIUM HYDROXIDE C1336216	1.00
			WATER C7732185	78.00
			HYDROGEN SULFIDE (H2S) C7783064	10.00
			MERCAPTANS (MIXTURE) S42214	1.00

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION	THERMOCRACKED NAPHTHA, HEAVY NN00005116		2-METHYLPENTANE C107835	
			M-XYLENE C108383	
		*	TOLUENE C108883	
			OCTANE C111659	
			HEPTANE C142825	
			NAPHTHA, HVY THERMAL CRACKED C64741839	100.00

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION	WASTE WATERS/OILS S15625		HYDROCARBONS, C4 AND HIGHER C68476448	10.00
		*	BENZENE C71432	
			WATER C7732185	90.00
	WELDING&CUTTING: FUMES & GASES NN00002710		OZONE (03) C10028156	
			NITROGEN DIOXIDE C10102440	
			CARBON DIOXIDE C124389	
		*	IRON OXIDE (FE2O3) C1309371	

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION			MAGNESIUM OXIDE C1309484	
			NICKEL OXIDE C1313991	
			ZINC OXIDE C1314132	
			TITANIUM OXIDE C13463677	
		*	CHROMATE (CR04) C13907454	
			FLUORIDES C16984488	
			CARBON MONOXIDE C630080	

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION			ALUMINUM C7429905	
		*	MANGANESE C7439965	
			NICKEL C7440020	
			TUNGSTEN (SOLUBLE COMPOUNDS) C7440337	
			ARGON C7440371	
			CHROMIUM (METAL) C7440473	
			COBALT C7440484	

Facility: EL SEGUNDO REFINERY
Inventory Cross Reference to
06/30/97 - REPORT 204

WORK LOCATION NAME	SUBSTANCE NAME/ SUBSTANCE ID	ES6	COMPONENT NAME/COMPONENT ID	APPX PCT
COKER SECTION		*	COPPER FUMES C7440508	
			HELIUM C7440597	
			NITROGEN C7727379	

[EXHIBIT 23]

DEPOSITION OF CHARLES BRIAN TANG, M.D.
JUNE 30, 1997

[Page 5:18 to 7:18]

Q Do you have any knowledge about or knowledge of the medical examination that was purportedly done on March 8, 1996?

A I am aware of the examination done on the individual, but I'm not sure of the date. I have to check the date you quoted.

Q With the exception of the date, what's the basis of your knowledge?

A The basis of my knowledge is this gentleman came in for a pre-employment physical examination. He was examined by Dr. Socol, Harvey Socol, and we discussed his case with regard to some abnormalities on his physical examination which we felt would be of danger to him if he continued to work in a refinery environment.

Q Do you know in fact Dr. Socol performed any kind of physical examination on Mr. Echazabal?

A Yes, I know he did.

Q How do you know that?

A Because he told me.

Q Other than his representations, do you have any independent knowledge that he performed an examination?

A From what he told me, plus what he wrote on his medical records.

Q Were you present in the clinic on that day?

A Yes, I was.

Q Did you actually see Mr. Echazabal go into any kind of room with Dr. Socol?

A No, I did not.

Q Did Dr. Socol share his thoughts about the purported examination with you on or about the date of the examination?

A Yes, around that approximate time, he did.

Q Was that immediately after the examination, or before he wrote anything up?

A I can't remember.

Q Do you know if he talked to you about the examination of Mr. Echazabal before he wrote any kind of opinion regarding Mr. Echazabal's condition?

A He did talk to me about the examination before he wrote an opinion.

Q Did you provide him with any input?

A Yes, I did.

Q Why don't you tell me what input you provided? What did Dr. Socol say to you and what did you say to Dr. Socol?

A Dr. Socol and I discussed his elevated liver enzymes and our concern about the cause of his liver enzymes being elevated, and if they remained elevated, he should not be exposed to potential hepatotoxins.

[Page 27:7 to 37:23]

Q Is it your opinion that no one can work at a refinery if somebody has elevated enzyme levels?

A It's my opinion that a person should not work in a refinery if he is going to be exposed to hepatotoxins, but he can work in a refinery if he is not going to be exposed to hepatotoxics.

Q Irrespective of their enzyme level?

A That's correct. If his liver enzymes are elevated, but he's not going to be exposed to hepatotoxins, then he should be able to work in a refinery. But, if he is going to be exposed to hepatotoxins, and has elevated liver enzymes, he should not be working there.

Q Irrespective of work he might be doing there; is that right?

Mr. Kardassakis: Ambiguous.

By Mr. Minsky:

Q In other words, you said he shouldn't be working in a refinery if his liver enzymes are elevated and he's going to be exposed to certain kinds of toxins; is that right?

A Yes.

Q That's true, irrespective of the amount or frequency with which he will be coming into contact with those toxins?

A Yes.

Q So just the slightest exposure and what would happen?

A What is your definition of a slightest exposure?

Q Well, you tell me what would cause, in your opinion – let's back up.

If a person with elevated enzymes, in your opinion, should not be exposed to certain types of toxins, what first off, is the level at which you deem to be too high a level for that person not to be exposed to the chemicals, to the toxins?

A I feel he should not be exposed to any hepatotoxins.

Q My question is, at what level do you believe that a liver enzyme level is too high in order not to be exposed to hepatotoxins?

A At the level where the liver enzymes are in their hundreds.

Q So if the liver enzymes reach at least 100 or above?

A Right. 100 or above I would seriously consider not exposing that individual to hepatotoxins.

Q Does it matter the degree or the amount of exposure? In other words, once they are – enzyme levels are 100 or above, is it your opinion that there is no way in which that employee should be exposed to the chemicals – in other words, on an eight hour day, take an eight hour day. If one hour out of that eight hour day, they are going to be exposed to the chemicals, is that too much if the enzyme level is 100 or above?

A Yes.

Q Is there anything that could be done to ensure that a monitoring process for example, to ensure that if they are exposed, that we can pull that employee out of there?

Mr. Kardassakis: Ambiguous.

By Mr. Minsky:

Q Would a monitoring process to check the enzyme levels be an appropriate way to determine whether or not it in fact is going to cause some risk of injury to the employee, if they are exposed to the hepatotoxic chemicals?

A I don't understand the question.

Q I'll try again. Take an employee who has got an enzyme level 100 and above. You put them as a risk category; correct?

A Yes.

Q Is every individual going to be subjected to injury if they are exposed to the hepatotoxic chemicals if they have 100 and above?

A Is every individual–

Q Who has an enzyme level of 100 and above going to represent a risk of injury if they are exposed to hepatotoxic chemicals?

A Not every individual. Just like any individual who has no elevated liver enzymes.

Q So just simply because you have a higher or elevated enzyme level doesn't mean you have a risk of injury; is that right? If you are exposed to hepatotoxic chemicals?

A Well, we have an individual who is injured already, with the liver disease, the elevated liver enzymes, so he is already injured, and we know hepatotoxins can make it fatal.

Q We are talking theoretically; correct?

A No, theoretically. Realistically, yes.

Q When you say realistically, how long will it take for an individual, such as Mr. Echazabal, to be exposed to those chemicals and toxins before they will show some sort of injury occurring?

A Some people I know have died. Reported in the literature, have died in a few days. Others, it takes months and years to do that.

Q When will you start – as far as the literature goes, doctor – start seeing some sort of indication in the enzyme levels as a result of exposures to the chemicals and toxins?

A It could be in a matter of a few hours as I mentioned, some people have died of massive hepatic failure in a few hours, and can also occur over months and years, too.

Q Would it be fair to say somebody exposed to the chemicals over a ten year period should indicate some sort of change in their enzyme level?

Mr. Kardassakis: Incomplete hypothetical.

By Mr. Minsky:

Q A person such as the plaintiff, Mr. Echazabal, who is exposed to the chemicals and toxins over a ten year period, would you anticipate seeing some sort of change in the enzyme level?

Mr. Kardassakis: Incomplete hypothetical. You haven't told him when he first had that, what treatment he had in the intervening time, or what his liver enzymes did over time.

Mr. Turner: Join.

By Mr. Minsky:

Q You said that the literature reflects that it could be as short as a few hours; sometimes months, before any kind of effect will have on that individual; correct?

A Yes, from exposure to hepatotoxins.

Q You said Mr. Echazabal was an injured person, right? Isn't that your testimony?

A Yes. He has a chronic potentially fatal illness, right now.

Q Are you aware that Mr. Echazabal had been working at the refinery for many years?

A I don't know his entire history, how many years he was working. I don't know.

Q Do you have any idea as to how long in fact Mr. Echazabal had been diagnosed with having hepatitis?

A Reviewing his records today, it appears that they knew it in about 1992.

Q Would you anticipate that somebody with his chemical – excuse me – his enzyme level should have – there should have been some sort of reaction in terms of the enzyme level for his continued exposure to the hepatotoxic chemicals between 1992 and 1996?

Mr. Turner: Objection, incomplete hypothetical. Calls for speculation, also misstates the facts.

Mr. Minsky: Which facts?

Mr. Turner: There is no evidence he's actually been exposed.

By Mr. Minsky:

Q You can answer the question.

Mr. Kardassakis: Do you want him to assume no treatment? He got treatment, but you haven't told him that in the hypothetical.

By Mr. Minsky:

Q First off, doctor, do you know what the level of treatment was?

A Well, first of all, I don't know where he was, whether he – what type of work he's been doing, whether he's been exposed to hepatotoxins, what treatment he's been getting, so I wouldn't know how to answer that question, presently.

Q Is it your position that there is simply nothing that can be done for an individual to allow them to work in an environment

where there are hepatotoxic chemicals if they have an elevated enzyme level, meaning over 100?

A I would not want anyone or myself to work in an environment where there are hepatotoxins with such elevated liver enzymes.

Q What do you think the chance of risk of injury is? Would you say it's 50 percent likely they will develop deterioration of their medical condition from exposure?

A I don't know.

Q You don't have any opinion, doctor?

A Well, my opinion is, it's individualistic, and it's – all I know it occurs, and when it occurs, it's the person that suffers that gets hurt.

Q So you don't have an opinion one way or the other, whether it's a 50 percent chance or likelihood the person will develop a deterioration of the condition?

Mr. Kardassakis: Incomplete hypothetical, calls for speculation.

Mr. Turner: Join.

By Mr. Minsky:

Q You can answer.

A I wouldn't know how to answer it, except I am concerned about the individual, that he has a chronic illness which can be severely worsened by the hepatotoxins.

Q What do you think the likelihood of that worsening is, greater than 50 percent?

Mr. Kardassakis: Incomplete hypothetical, calls for speculation.

By Mr. Minsky:

Q Mr. Echazabal was there. You have seen his medical chart. You know he was working at the refinery; correct?

A As I recall, he was working at the refinery.

Q All right. He's working at the – what do you think his – you concurred in a report written by Dr. Socol saying no exposure to hepatotoxic chemicals; right?

A Yes.

Q What do you think the likelihood is of him developing any deterioration of his condition if he went and took that job?

Mr. Kardassakis: Incomplete hypothetical.

By Mr. Minsky:

Q You can answer, doctor.

A Depends on how much exposure he gets.

Q Well, did you evaluate that? Did you ask any questions about that when you concurred with Dr. Socol?

A We talked about it, but any exposure still could cause it as trace amounts could blow out his liver.

Q What did you determine? In your opinion, once he walks in there, he's got 100 percent chance that it's absolutely going to happen and he's going to deteriorate his condition; is that right?

A There is a high probability.

Q What would you say that probability is, greater than 50 percent?

A I don't put figures on that.

Q I would like you to put a figure on it; give me your best medical opinion what you think that probability is?

A I don't know.

Q You don't have the slightest idea?

Mr. Kardassakis: Argumentative. He said "high probability". He didn't put numbers on it. You are raising your voice.

By Mr. Minsky:

Q High probability. Does it mean greater than 50 percent?

A I'm not going to put numbers on it.

Q I don't know what you mean by "high". What is "high", doctor?

Mr. Kardassakis: Argumentative.

By Mr. Minsky:

Q You can answer that. My voice is not elevated.

Mr. Turner: I would join in the evaluation of plaintiff's counsel's voice.

By Mr. Minsky:

Q What is "high", doctor? Does doctor mean by "high", greater than 50 percent, ten percent? What do you mean?

A Any level above one percent is high for me when it's a person's life.

Q Thank you, doctor.

Did you think it was important to understand precisely what kind of job he would be doing in order to render your determination with Dr. Socol in telling Irwin Industries that Mr. Echazabal should not go to work at whatever job duties he was going to do?

Mr. Turner: Objection, misstates the findings.

The Witness: Our recommendation is that he not be exposed to hepatotoxins, based on his physical examination and then the companies decide, based on our recommendation, if that job entailed that risk or not.

If it does not entail any exposure to hepatotoxins, he's hired. If he's exposed to hepatotoxins, our recommendation is that he is not hired. I'm not involved in what his job is over there, because I don't know.

[Page 45:4 to 49:22]

Q Any other formal training?

A I have just attended residency courses at UCI. Rutgers University School of Medicine in New Jersey. Became board certified in occupational medicine in 1992.

Q Are you also board certified in internal medicine?

A No.

Q Do you hold any other board certifications other than occupational medicine?

A No.

Q And you have been practicing as a doctor in private practice since 1978 in California?

A Approximately around that time. I was licensed in California in 1974, I believe, but I didn't come out here because I was in Africa, for a while.

Q But since approximately 1978, have you been in private practice in California?

A Actually, I opened up my office – yeah, about that time, '78, '79.

Q You said you teach at the USC School of Medicine. What do you teach?

A I teach occupational preventive medicine. I teach the residents.

Q In occupational preventive medicine, is one of the things you are concerned about, not exposing employees to circumstances or conditions that would endanger their health?

A Yes.

Q Now, Mr. Echazabal had, according to your review of the medical records, markedly increased liver enzymes, didn't he?

A Yes.

Mr. Minsky: Objection. That's not the testimony.

By Mr. Kardassakis:

Q Is one of the functions of the liver to help act as sort of a detoxification site for the body?

A Yes.

Q If you have markedly increased liver enzymes, does that tell you the liver is not fully functional?

A Yes.

Q Does that mean a person with increased liver enzymes would have less capacity to deal with toxins once they get into the body?

A Yes.

Q Does that mean the person is more at risk for death as a result of exposure to toxins?

A Yes.

Q Do hepatotoxins not only potentially cause death, but also further damage to the liver itself?

A Ayes.

Mr. Minsky: Objection. Restate the question. (Record read)

The Witness: Yes.

By Mr. Kardassakis: What is the risk of putting a person with Mr. Echazabal's liver enzyme tests into a refinery? Why would you not want to do that?

Mr. Minsky: Objection. Incomplete hypothetical. The same problems you were referring to before, counsel.

The Witness: What's the question again?

By Mr. Kardassakis:

Q Why would you not want to put Mr. Echazabal to go back to work in the refinery? What's the concern?

Mr. Minsky: Same objection.

The Witness: The concern is as I mentioned to Mr. Minsky, is that I just don't want this individual to be exposed to hepatotoxins. If he can work in a refinery without exposure, without exposure to hepatotoxins, he can work in a refinery, but if his work entails he will be exposed to hepatotoxins, I would not recommend that he do that.

Q Why?

A Why? Because he has a condition that will be worsened by such an exposure, causing probable death.

Q When you have a person who is in his condition, and it may cause their death, would you recommend the employer play it conservatively on how much exposure they are going to allow or how much they are not going to allow?

Mr. Minsky: Objection, incomplete hypothetical; assumes facts not in evidence, lack of foundation. You are asking the doctor to speculate on things which the doctor already indicated he doesn't want to speculate on.

How can he answer a question he refuses to answer questions on, because he doesn't like to give the numbers?

The Witness: If he's exposed to hepatotoxins, he should not be there.

By Mr. Kardassakis:

Q Period?

A Right.

Q You are not going to try to quantify how much exposure he can have during the course of the day?

A Right. With his physical condition, he should not be exposed to hepatotoxins.

Q That's because with his condition, even a small amount of exposure can result in his death; is that right?

A Yes.

Mr. Kardassakis: No further questions.

Examination (Resumed)

By Mr. Minsky:

Q Doctor, even a small amount you said can result in his death. Is that what you testified to?

A Yes.

Q You are saying, based upon what you have read in the report of Mr. Echazabal, you believe the slightest exposure to hepatotoxic chemicals will cause his death; is that right?

A It can.

Q What is the probability of that cause, doctor?

A In all due respect to me, you asked me that question last time, and I said I cannot put a number on that.

Q So it's all or nothing? In other words, either he not be exposed because if he is exposed, death is going to occur; is that right?

A Death can occur.

[Page 54:6 to 55:14]

Q If Mr. Echazabal's condition remains constant and he would be working in the refinery, did that play in at all in your opinion as to whether or not he should be allowed to continue to work in the refinery?

Mr. Kardassakis: Without foundation.

Mr. Turner: Same objection.

Mr. Kardassakis: Without foundation, incomplete hypothetical.

By Mr. Minsky:

Q You can answer.

A My answer to that is I didn't think his condition was stable. He has chronic active hepatitis by diagnosis. At the time, his condition was not stable.

Q Stable in the sense there hadn't been any real changes there?

A Well, his liver enzymes are markedly elevated, so there was a chronic destruction of his liver going on, chewing away at his liver inside, so the enzymes are always high. The only

time it's stable is if the liver enzymes came down to normal, which I never got evidence of.

Q When there is a deterioration in the liver, how does that affect – what do you actually see in terms of the effects of that on an individual?

A The effects on an individual, sometimes are minimal, sometimes they are severe, but the point is, is that there is a chewing up of his liver. It's slowly being destroyed and over time, it eventually requires a liver transplant, if there is one available. I understand interferon, which is trying to slow down the chewing up of the liver.

Q Did that have any effect?

A It didn't appear to. His liver enzymes were still markedly elevated.

[EXHIBIT 27]

Health Care Partners
Medical Group

January 10, 1996

Chevron Corporation
Medical Department
P.O. Box 97
El Segundo, CA 90245-9952

RE: ECHAZABAL, MARIO
SS#: 524-70-7651
MR#: 1-H102214

To whom it may concern:

Mr. Echazabal has been followed in the GI/Hepatology Department for several years with a history of chronic active hepatitis, secondary to hepatitis C. He has been treated with extended periods with Interferon without clearance of the problem. At present, he is asymptomatic.

The physical examination is unremarkable. He has no limitations.

Our plan is to follow him closely in the GI/Hepatology Clinic. He is able to return to regular duties without any limitations. He does not pose a contagious problem, provided he does not donate blood, use needles, etc. General measures have been explained to the patient in detail, but again, he is able to return to his usual duties at work.

If there are any questions about this, please do not hesitate to contact our office.

Sincerely,

/s/ Zelman Weingarten, M.D.

[EXHIBIT 28]

Chevron U.S.A. Products Company
El Segundo Refinery
324 W. El Segundo Boulevard
El Segundo, CA 90245
(310) 615-5000
Medical Clinic

January 10, 1996

MORDO SUCHOV, M.D.
Health Care Partners Medical Group
1025 W. Olympic Blvd.
Los Angeles, CA 90015

RE: MARIO ECHAZABAL
SS#: 524-70-7651
MR#: 1-H102214

Dear Dr. Suchov:

I've been informed that an applicant for employment, Mario Echazabal, has been under your care for abnormal hepatic function and continuing treatment relative to hepatitis C.

Mr. Echazabal is re-applying for work at Chevron after a three year interim of treatment. This clinic had done an extensive work-up, including communications with the treating doctors at that time. In order to consider his present application we will need recent results of his current liver function tests and short letter from yourself giving the present diagnosis, condition and prognosis.

The job Mr. Echazabal has applied for may entail exposure to hepatotoxic hydrocarbons, thus we would appreciate your opinion as to whether this exposure would be a risk to his present liver condition.

Enclosed please find authorization for release of medical information signed by the applicant. A self-addressed, stamped envelope is enclosed for your convenience in replying. Any charges for this information would remain the responsibility of the applicant. Thank you for your assistance and cooperation in this matter.

Sincerely,

/s/ Kenneth McGill, M.D.

KM/jl

Enclosures

[EXHIBIT 29]

Health Care Partners
Medical Group

February 28, 1996

Kenneth McGill, M.D.
Chevron USA Products Company
El Segundo Refinery
324 West El Segundo Blvd.
El Segundo, CA 90245

Attn: Medical Clinic
Re: Mario Echazabal
S.S. #524-70-7651
M.R. #1-H102214

Dear Dr. McGill:

In response to your letter of 1/10/96, I would first like to refer you to the letter we sent you on 1/10/96, which it appears has not reached your desk (I am including a copy of that letter for your evaluation). Mr. Echazabal has been treated here in the past for chronic active hepatitis secondary to hepatitis C. Although he received extended periods of Interferon therapy, the problem was not cleared. During the last physical examination, we found the patient to be in good general health without any changes and no evidence of liver failure. I had recommended at the time for him to be allowed to return to work and to his usual activities, and I recommended some general measures. In your letter, it is mentioned that Mr. Echazabal has applied for return of his job and it mentioned that "this may entail exposure to hepatotoxic hydrocarbons." This, of course, is recommended not to be the case. If we can

be of any assistance, please do not hesitate to contact us.

Sincerely,

/s/ Zelman Weingarten, M.D.

———◆———

[DECLARATIONS SUBMITTED IN OPPOSITION TO CHEVRON'S MOTION FOR SUMMARY JUDGMENT]

DECLARATION OF MARION JOSEPH FEDORUK, M.D.

I, MARION JOSEPH FEDORUK, M.D., hereby declare and state:

1. I am a medical doctor, board certified in Occupational Medicine, Industrial Hygiene and Toxicology. The matters stated in this declaration are true of my own personal knowledge, except as to matters stated on information and belief, and as to those matters, I believe them to be true.

2. I received my medical degree from the University of Alberta in Edmonton, Canada in 1978. Thereafter, I served a mixed internship at Montreal General Hospital (McGill University) in Montreal, Canada from 1978 to 1979, and was a Resident in Occupational Medicine through the Department of Community and Environmental Medicine at the University of California, Irvine from 1981 to 1983. I served as a Lecturer in the Graduate School of Public Health, Division of Public Health, Division of Occupational and Environmental Health, San Diego State University from 1983 to 1988. From 1985 to 1986, I was a Clinical Instructor of Medicine, Department of Medicine, University of California, San Diego, School of Medicine. In 1985, I became Assistant Clinical Professor of Medicine, Department of Community and Environmental Medicine, University of California, Irvine. I have also held an

appointment as Assistant Clinical Professor of Medicine, Pulmonary Division, Department of Medicine, University of California, San Diego, School of Medicine.

3. My main medical specialty lies in the area of occupational medicine, toxicology and exposure assessment, wherein I assess work places, including a wide variety of industrial facilities such as oil refineries to determine and assess employee health risks for, inter alia, exposure to toxic chemicals, including liquids, dusts and fumes. I am certified by the American Board of Preventive Medicine, certified in Occupational Medicine, American Board of Toxicology, and the American Board of Industrial Hygiene - Toxicology Aspects. A true and correct copy of my current curriculum vitae is attached hereto as Exhibit A and incorporated.

4. I examined/reviewed at least the following materials/information, conducted my own studies, researched, and spoke with the following persons in connection with the opinions and conclusions described herein: (a) I met and spoke with the plaintiff, Mario Echazabal (Echazabal); (b) I personally visited Chevron's El Segundo Refinery (Refinery), spoke briefly with Mr. Michael Nyeholt (Nyeholt) while at the Refinery, took photographs of the coker area, and took several air samples for petroleum hydrocarbons to which Mr. Echazabal could have been exposed while at the Refinery; (c) I reviewed deposition transcripts and declarations of Messrs. DiPadua (DiPadua) and Saner (Saner); (d) I reviewed the declarations of Dr. C. Brian Tang (Tang); (e) I reviewed the declarations of Patrick Beatty (Beatty), Dr. Kenneth McGill (McGill), Dennis Leonard (Leonard), Mr. Nyeholt, and Julie L. Claydon, together with all exhibits attached thereto; (f) I reviewed Mr. Echazabal's medical records; and (g) I performed my own review of pertinent literature, which included the following sources: Hyman J. Zimmerman, M.D.'s text entitled *Hepatotoxicity: The Adverse Effect of Drugs and other Chemicals on the Liver*; Robert K. Ockner's article

"Laboratory Tests in Liver Disease" from the *Cecil Textbook of Medicine* edited by James B. Wyngaarden, M.D. and Lloyd H. Smith, Jr., M.D.; The National Institutes of Health Consensus Development Statement "Management of Hepatitis C" dated May of 1997; "Common Laboratory Tests in Liver Diseases" by Howard J. Worman, M.D. from the University of Columbia.

5. Mr. Echazabal has hepatitis C which is a chronic viral infection of the liver characterized by ongoing liver inflammation. This is a chronic condition and individuals with this disorder generally live for decades. Mr. Echazabal's medical records indicate that he reports no symptoms of liver failure, has no clinical findings on physical examination that would demonstrate the presence of an impaired liver, and his blood tests which assess the ability of his liver to maintain normal body functions including metabolism and elimination have been normal overall.

6. The liver has an essential role in maintaining the overall functioning of the body including general metabolism and elimination of waste products. It is responsible for making of proteins such as albumin and blood clotting factors. The liver also plays a role in eliminating metabolic waste products such as bilirubin which is a metabolic waste product formed from the breakdown of red blood cells. There is no evidence that these functions are impaired; in fact, the overall test results which measure these liver activities establish that these liver functions are operating well within normal limits.

7. Blood tests can measure whether a person's liver function is adequate to maintain normal body functioning. For example, Mr. Echazabal's blood tests have consistently revealed normal albumin levels which is one of the main proteins that the liver manufactures. His blood tests reveal that the ability of his liver to maintain normal biochemistry or body metabolism is not impaired. Drs. Tang, Philip Baily, and McGill's opinions to the contrary are simply wrong.

8. The three specific enzyme test results identified by Dr. McGill in his declaration, the GGT, SGOT/AST and SGPT/ALT, and referred to by Dr. Tang show evidence of inflammation of the liver and generally reflect that certain enzymes from certain cells in Mr. Echazabal's liver are injured and are leaking a higher than normal amount of enzymes into his blood stream. These tests do not mean, however, that Mr. Echazabal has liver failure or that his liver is not able to maintain normal bodily functions or metabolism.

9. Mr. Echazabal is in my opinion capable of being employed in the position he applied for as a helper at the Refinery, and working in this position would not place his hepatitis C condition at a clinically significant increased risk. This opinion is based on several reasons, in addition to what I have already expressed.

10. Mr. Echazabal has been employed at the Refinery for decades, beginning in 1972 through and including February of 1996, save for a break from approximately 1975 to 1979. During his employment at the Refinery, he performed similar tasks at the coker unit, the same unit and work environment he would have worked in had he been hired by Chevron to work as a plant helper. The plant helper position for which Mr. Echazabal applied did not differ in any material manner, from an environmental and/or health risk to his liver, than the majority of work that he had previously been performing for decades at the Refinery. Since 1992, when a record of his blood tests actually began, Mr. Echazabal has not shown any clinically or medically significant change in his overall liver condition.

11. One of the principal sources of potential hydrocarbon exposure for the plant helper and for Mr. Echazabal during the majority of the time he worked at the Refinery were the processes associated with the coker unit. The coker unit is involved in thermally cracking residuum and extracting distillates (DiPadua declaration). Hydrocarbons which are

distilled from this process include heavy naphthas, light napthas, and sour naphthas. The function of the coker unit is not, as suggested by Chevron in its papers, the "distillation of liver toxic hydrocarbons." As discussed below, there is no medical or scientific evidence that exposure to the petroleum hydrocarbons emanating from this process at the levels encountered represents a significant risk of hepatotoxicity for employees including Mr. Echazabal. The potential for exposure to hepatotoxins that could cause liver injury is clinically insignificant and is the same for Mr. Echazabal as it is for others performing similar tasks at the Refinery.

12. The potential hydrocarbon exposures that plant helpers may or do experience are known since the atmospheric hydrocarbon concentrations associated with performing tasks at the coker unit and other relevant areas have been quantified by Chevron personnel. These levels are set forth in Exhibit 18 attached to the declaration of Mr. Nyeholt. Thirty-nine air tests have been conducted for hydrocarbon levels by Chevron staff in the coker area. These samples were primarily taken of workers performing routine tasks as well as special tasks in the coker area and provide a direct indication of the type of exposure that Mr. Echazabal encountered in his prior work and would encounter if he were given the job of a plant helper.

13. Eight of the air tests conducted by Chevron (Exhibit 18) revealed nondetectable levels of hydrocarbons, meaning that the laboratory that conducted the analyses for Chevron was not able to measure any detectable level of hydrocarbons in the samples taken. Nondetectable levels were measured during many types of operations including work at the coker drum. Tasks that were identified as being performed included drum feed switching, monitoring the deheading process, dropping the head of the drum, and general monitoring of the coker drum. The tests revealed that nondetectable hydrocarbon levels were even measured in a worker who was "enveloped in steam that is normally released in this process." Other tasks which

revealed nondetectable hydrocarbon concentrations included unplugging a plugged coke drum. This individual was described as having "spent a lot of time in steam clouds."

14. During my visit to the Refinery, both I and Mr. Minsky, Mr. Echazabal's counsel, took various photographs. The camera used was a Pentax P2-70. Attached hereto as Exhibit B is a true and accurate photograph of me standing within the coker structure holding a Drager testing device in my hands. A cloud of vapor surrounds my body. This photograph was taken by Mr. Minsky using this camera. The results of the test taken as depicted in this photograph reflected that the vapors within which I was enveloped contained a nondetectable level of petroleum hydrocarbons.

15. Chevron's monitoring records (Exhibit 18) also reveal that thirty-six air tests had concentrations that were less than five parts per million. This involved a broad range of activities that included work directly while heavy oil gas was being discharged from a sampling box and a heavy stream of naptha was being discharged into a drain at the feet of the operator. The operator was described as being exposed to a "heavy vapor coming from the heavy gas oil sampling box." Other tasks that were monitored included routine maintenance functions, working on a steam pump, and being exposed to "vapors while steaming out for maintenance." The highest measured concentration was only eleven parts per million.

16. There is no reliable scientific or medical evidence to suggest that exposures to petroleum hydrocarbon vapors from naphthas at the concentration levels referenced at paragraph 15 pose a realistic risk of hepatotoxicity for Mr. Echazabal. Naphthas represent a broad range of hydrocarbons which as a group have trivial or clinically insignificant potential to produce hepatotoxicity in occupationally exposed persons.

17. Several agents are identified by Chevron as being hepatotoxic other than naphthas. However, given the exposure

levels to which plant helpers are likely to be exposed, taken together with the potential of these agents to produce liver injury based on my research as described herein, there is no reliable evidence to conclude that Mr. Echazabal's liver function would worsen or become impaired by remaining employed within the coker and/or being hired to work as a plant helper. Furthermore, my review of Mr. Echazabal's medical records supports my opinion that there has been no significant change in the condition of his liver since his condition was first detected.

18. Coke dust has been implicated by Chevron as being a hepatotoxic agent. In their declarations, Mr. DiPadua and by inference Dr. McGill state that coke dust contains hepatotoxic agents. Mr. DiPadua and Dr. McGill fail to point out, however, that at the level of coke dust exposure at the Refinery, the atmospheric concentrations of coke dust would be medically insignificant and not lead to hepatotoxicity. Furthermore, Chevron industrial data demonstrate that exposure to coke dust is minimal. Area samples obtained in the area of the coker including the drilling and cutting of drums revealed nondetectable concentrations. Monitoring devices offered to employees performing tasks such as cutting drums, working around the furnaces, deheading and reheading drums, cutting the drums, working as a coke handler, working around the coke transport system, primary and secondary coke crushers, the A-Frame storage area, and the coker overhead crane all revealed very low and clinically insignificant exposure levels. The highest concentration level measured was collected inside a "circus tent" located near the crusher and coke pit belt system. However, all of these exposures are significantly below the recommended exposure limit for coke dust recommended by Chevron.

19. The Chevron MSDS, the document used to communicate information on the hazardous properties of a substance or the regulatory warning notification, for coke only identified

polynuclear aromatic hydrocarbons as being potentially hazardous constituents. Polynuclear aromatic hydrocarbons would not be expected to produce hepatotoxicity. The MSDS does not identify the presence of any hazardous metals that Dr. McGill and Mr. DiPadua have identified as being present inside and/or mixed in with coke including lead, iron, manganese, selenium and other substances. It is likely that coke dust could contain these metals; however, it is important to point out that these metals are likewise routinely found in soils and dust throughout Southern California and to which Mr. Echazabal is routinely exposed. There is no evidence that is available to me that the coke/coke dust to which Mr. Echazabal and others were routinely exposed contain large amounts of these metals in concentrations that would pose a risk of hepatotoxicity. Indeed, the Chevron MSDS states that the coke dust could be classified as nuisance dust by the American Conference of Governmental Industrial Hygienists.

20. Even assuming that coke dust contains iron, manganese and selenium at a concentration of 1%, the metals described by Chevron, there is no evidence that the exposure levels which any employee, including Mr. Echazabal, would experience would present a clinically significant risk of hepatotoxicity. One to two over-the-counter multivitamin and mineral tablets contain a larger dose or amount of iron, selenium and maganese than the amount Mr. Echazabal would be likely to absorb from breathing Refinery air on a daily basis from working at the Refinery.

21. The other agent identified in or mixed in with coke dust is lead. Atmospheric tests for lead by Chevron (Ex. 18) revealed that there is no evidence that potential lead exposures that Mr. Echazabal would and did receive would pose a risk of hepatotoxicity. I have read the statement of Mr. Nyeholt with respect to lead exposure. Mr. Nyeholt indicated that in one air sample, that lead exposure was increased at a concentration of 210 ug/m3 which is over the current OSHA limit by

approximately four times. He indicated that lead is a chemical dangerous to the liver. Irrespective of the purported purpose of this statement, it is medically and scientifically irrelevant to assess the potential risk to Mr. Echazabal had he continued to work in the Refinery. First, the task identified by Mr. Nyeholt was the removal of a lead lining that was in a flash vessel. This is work that would not be performed by Mr. Echazabal and indeed was performed by a contract employee. Second, the concentrations present for eight hours would mandate the use of proper respiratory and other protective equipment in accordance with Cal-OSHA regulations. The use of respirators and appropriate personal protective equipment and work practices would eliminate the lead hazard for any worker, including Mr. Echazabal.

22. I have also reviewed the list of chemicals attached to Mr. Beatty's declaration and conducted my own investigation and analysis. The fact that Chevron maintains chemicals in its Refinery which are toxic and/or potentially hepatotoxic does not mean that Refinery workers such as Mr. Echazabal are exposed to concentrations that pose a realistic risk. Chevron's monitoring reports and the statements of its personnel reflect that Chevron has a staff to maintain compliance with all OSHA safety regulations in the handling of all toxic substances and the mere presence of a chemical on a list does not imply that a worker would have a significant exposure to the chemical.

23. I have also reviewed the declaration of Mr. Leonard and Exhibit 21, Chevron's Toxic Chemical Release Inventory, and have reached the same conclusions and opinions as expressed above; namely, that Mr. Echazabal is not at risk by virtue of the fact that Chevron maintains these chemicals in the Refinery/coker.

24. I have also examined and considered the issue of possible leaks and episodic explosions to which Mr. Echazabal and all other persons in the Refinery could be exposed. There are lethal and potentially hepatotoxic chemicals at the Refinery

and in the event of an explosion, any person with significant exposure in the Refinery would likely experience negative health consequences. In my opinion, however, Mr. Echazabal is at no greater risk than anyone else from sustaining an injury.

25. The cleaning agents, oils, greases, lubricants and solvents identified by Dr. McGill and Mr. DiPadua do not represent any clinically significant risk of hepatic injury to Mr. Echazabal from the anticipated use of the products. Furthermore, given the protective clothing that is available and is worn, the theoretical risk of hepatic injury to Mr. Echazabal based on a potential exposure to these substances is clinically insignificant.

26. Dr. Tang's representation that any exposure to liver toxins would harm and probably kill Mr. Echazabal is insupportable. Dr. Tang's conclusion that Mr. Echazabal not work around or with hydrocarbons is not realistic and cannot be achieved when taken at face value. Hydrocarbons are ubiquitous in the general environment and come from a number of sources such as auto exhaust, consumer products such as toiletries and perfumes, cleaning products, emissions from paints and carpeting, glues, adhesives, and thousands of other commercial products. Los Angeles air routinely contains many hydrocarbons. Consequently, it is not possible to work anywhere in a job that involves no exposure to hydrocarbons. The determination that somebody should be removed from working in an environment should be based upon objective medical and scientific evidence that the work environment poses an actual risk of substantial harm. The determination of this risk should be based upon information about the exposure potential to the chemical(s) in question, the toxicity potential of the agent, and the dose response relationship of the agent, since the toxic effects of any agent are largely dependent upon dose or the amount a person receives. An aspirin may be useful for a headache but several hundred are harmful. Based upon my review of the available medical information and a review of

deposition transcripts and other information, this type of assessment was not made by defendants. In addition, from an industrial hygiene perspective, the adverse health effects of many exposures can be adequately controlled through the use of personal protective equipment, such as the use of respirators, other equipment, and following proper work practices.

27. During the period between late 1992 and February 1996, Chevron received and/or evaluated medical reports and laboratory results concerning Mr. Echazabal's ongoing medical condition. During this time period, Mr. Echazabal continued to work in the Refinery. Had Chevron hired him or had he not been hired but been allowed to continue to work in the Refinery, his medical condition could have been monitored. The monitoring could have consisted of several types of actions, including medical examinations and blood tests. This type of monitoring is routinely performed in industry to assess workers for early adverse effects of chemicals. Chevron currently maintains such a practice for workers who are exposed to recognized hazards at the Refinery. This simple type of surveillance would have provided defendants with the means to monitor the condition of Mr. Echazabal's liver.

28. The risk of suffering an injury from an explosion at the Refinery is not unique to Mr. Echazabal. My review of his medical files confirms that there is no evidence that his liver condition places him at an unusual or increased risk of toxicity from smoke, heat, carbon monoxide or cyanide gas which are the common hazards associated with death or significant injuries from fires. Furthermore, given his work history at the coker, which specifically required him on a routine basis to work with leaks at the coker as well as fires and explosions, there is no demonstrated evidence in his medical file that Mr. Echazabal's liver worsened.

29. There is no medical or scientific evidence which supports the conclusions presented by defendants that Mr. Echazabal's health and specifically his liver condition were or

would be placed at any appreciable or clinically significant degree of risk if he had been permitted to continue to work at the Refinery or been hired as a plant helper. Mr. Echazabal's past history of employment at the Refinery, together with my review and evaluation of the chemicals to which he was or would have been exposed, hepatotoxic or otherwise, reflect that the duties to which he was or would have been assigned at the coker/Refinery did not pose a risk or unusual health threat to Mr. Echazabal, nor would it have caused any significant clinical change to his hepatitis C condition.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on this 4 day of November, 1997.

/s/ Marion J. Fedoruk
MARION JOSEPH FEDORUK, M.D.

DECLARATION OF GARY GITNICK, M.D., F.A.C.G.

I, GARY GITNICK, M.D., F.A.C.G., hereby declare and state:

1. I am a medical doctor, professor of medicine and Chief of the Division of Digestive Diseases at the University of California Los Angeles School of Medicine. The Division of Digestive Diseases at UCLA is one of the largest gastroenterology divisions in the world. I received my Bachelor of Science and Doctor of Medicine degrees at the University of Chicago, after which I completed an internship at Johns Hopkins University Hospital. Thereafter, I completed by internal medicine and gastroenterology subspecialty training at the Mayo Clinic and spent three years as a research associate at the National Institutes of Health. In approximately 1969, I

joined the faculty at the University of California. Currently, some of my administrative responsibilities include serving as the Chief, Division of Digestive Diseases at the UCLA School of Medicine. I have previously served as Chief of Staff, UCLA Medical Center, Medical Director, UCLA Health Care Programs, Director of the Division of Gastroenterology Research Laboratories, and Chief Immunovirology Research Section at UCLA. Currently, I am also a member of the American College of Gastroenterology, Western Society for Clinical Research, the American Association for the Advancement of Science, American Association for the Study of Liver Diseases, American Federation for Clinical Research, American Gastroentrological Association, American Society for Microbiology, International Association for the Study of Liver Diseases, Royal Society of Health, London, Royal Society of Medicine, London, Southern California Gastroenterological Society, and Western Society for Clinical Investigation.

2. During the 30 plus years that I have been practicing in this field, I have written or edited over 300 publications and am the author or editor of at least 60 different books, including the text books entitled *Principles and Practices of Gastroenterology and Hepatology*, *Diseases of the Liver and Biliary Tract*, and am also the editor of a yearly series of books inclusive of such titles as *Current Hepatology* and *Current Gastroenterology*.

3. During the span of my practice in this field, I have delved extensively into the area of liver disease. In fact, one of the research groups that I was involved with actually described non-A, non-B hepatitis later known as hepatitis C. I am intimately familiar with the research in this area and have written extensively on the liver, liver diseases, and specifically hepatitis C. A true and correct copy of my current curricula vitae, depicting my background and experience, described at

paragraphs 1-3 of this Declaration, is attached hereto as Exhibit C and incorporated.

4. I have examined/reviewed at least the following materials and information in connection with my opinions and conclusions described herein: (a) the Declarations of Dr. Marion Joseph Fedoruk, Dr. Kenneth McGill, Mr. Ron DiPadua; (b) deposition testimony from Drs. McGill, Baily, Tang, Mr. William Saner, and the Plaintiff, Mr. Mario Echazabal; (c) various documents submitted to my office for review pertaining to the job duties that Mr. Echazabal did perform at the refinery and what he would have been required to perform had he been hired by Chevron. I evaluated the information described above in connection with the years of research that I and others of whom I am aware have generated concerning persons such as Mr. Echazabal who have been diagnosed with chronic active hepatitis C.

5. My assessment of Mr. Echazabal's medical condition is that he has chronic active hepatitis C, a chronic viral infection of the liver characterized, as Dr. Fedoruk has stated, by ongoing liver inflammation. Individuals with this condition can and do live for decades. Chronic active hepatitis C affects a person's body in the following manner: for many decades, most people have no symptoms or signs of disease. Eventually, some may develop fatigue and even liver failure. The majority of people with hepatitis C lead normal lives and some never develop symptoms, while others may not develop symptoms for many decades.

6. The liver has essentially two major functions; those being (a) it metabolizes or breaks down both foreign substances which enter the body and normal substances produced by the body; and (b) it builds, stores and releases substances produced by the body/liver. For example, the liver makes proteins such as albumin. These are necessary building blocks for the body. It produces and releases clotting factors, such as prothrombin, and stores and releases glycogen to the body when required.

There is no evidence that any of these functions that Mr. Echazabal's liver performs or should perform is in any way impaired.

7. Between 1992 and 1997, a series of blood tests were taken from Mr. Echazabal. Blood tests can and do provide one of the best methods for determining whether a person's liver function is adequate to maintain normal bodily functioning. To determine whether a person's liver is functioning properly, there are two main tests which must be run and which serve as the best and only true indicators of liver function. See, for example, my book entitled *Diseases of the Liver and Biliary Tract*. The two tests are those which detect (1) albumin levels in the blood and (2) prothrombin. My review of Mr. Echazabal's medical file reflects that his prothrombin time was 12.3 with a control range of 11.0 to 13.2 based on a report dated August 1, 1993, and a prothrombin time of 12.4 with a control range of 11.0 to 13.2 based on a report dated February 17, 1993. Mr. Echazabal's medical records also reflect that his albumin readings were consistently within a normal range, going between 4.6 and 3.8, a normal range being defined as 3.2 to 5.5 seconds; these tests covered the period between 1992 and 1997. The results of his prothrombin and albumin tests establish that Mr. Echazabal's liver is functioning properly. These are the only tests which a physician can rely upon to determine liver function.

8. I am aware that Drs. Baily, McGill and Tang have rendered an opinion that liver function can be and in this case was established by examining the results of Mr. Echazabal's GGT, SGOT/AST, and the SGPT/ALT scores. This opinion is simply wrong and inconsistent with the body of literature pertaining to liver function. The GGT, SGOT/AST, and SGPT/ALT scores reflect only evidence of inflammation of the liver, and generally reflect that certain enzymes from certain cells in Mr. Echazabal's liver are injured and are leaking higher than normal amounts of those enzymes into his blood stream.

I agree with Dr. Fedoruk when he opines that these tests do not mean that Mr. Echazabal has liver failure or that his liver is not able to maintain normal bodily functions or metabolism. It is my opinion that any reliance upon these three enzyme tests to conclude, as have Drs. Baily, McGill and Tang, that Mr. Echazabal cannot be exposed to any particular kinds of chemicals, solvents, liquids, or vapors, hepatotoxic or otherwise, because his liver is not functioning properly, is simply wrong.

9. I am aware that Dr. McGill suggested that Mr. Echazabal was suffering from reduced liver function arising from his contraction of chronic active hepatitis C. Such opinions contradict the medical research in this area. See, for example, Dr. Seef's work on the nature course of hepatitis C. My review of Mr. Echazabal's medical file supports my contention that he has no symptoms of liver failure or a reduction in normal liver function whatsoever. While it is true that Mr. Echazabal has abnormal liver enzyme levels, those enzyme levels do not reflect reduced liver function. Mr. Echazabal's albumin levels are normal, his prothrombin levels are normal, his cholesterol levels are normal to below normal, his bilirubin levels are normal, he has no clinical findings on physical examination that demonstrate the presence of an impaired liver, inclusive of no evidence of ascites or encephalopathy. In short, there is no evidence whatsoever, based upon my years of teaching, clinical work, and research in the area, to support any medical conclusion/opinion that Mr. Echazabal's liver is not fully functional.

10. I am aware that Drs. McGill, Baily and Tang have opined that Mr. Echazabal's liver is less able to detoxify any chemicals, liquids or vapors, hepatotoxic or otherwise, that he would encounter or be exposed to generally and specifically while working at Chevron's El Segundo refinery. I am also aware that while working at the refinery, and specifically at the coker unit, Mr. Echazabal was repeatedly exposed to leaks and

on at least one occasion to an explosion. I am further aware that Chevron has identified a number of chemicals, solvents, liquids, and vapors which it claims to be hepatotoxic. Based on my review of Mr. Echazabal's medical file and my years of research in this field, I can say to a reasonable degree of medical certainty that Mr. Echazabal is in no greater risk of injuring himself and specifically his lever by working in the refinery than other employee. His liver is functioning properly and there is no evidence of liver failure. Mr. Echazabal's liver is as capable of detoxifying or metabolizing toxins that enter his body as is any other person.

11. I am also aware that Dr. Tang has opined that any exposure to hepatotoxic chemicals or liquids will harm and possibly kill Mr. Echazabal. Such a conclusion, in my opinion, is simply without any support in the medical literature. In years of studying the liver, liver disease, and specifically hepatitis, I am not aware of any research which directly correlates an exacerbation of hepatitis C to exposure of hydrocarbons.

12. I am also aware that Dr. McGill states at paragraph 8 of his Declaration that hepatotoxic exposure to a person like Mr. Echazabal with an impaired liver suffering from a progressive liver disease such as chronic active hepatitis C could be fatal. Once again, there is no evidence that Mr. Echazabal has an impaired liver, nor is there any basis to conclude that the kinds of exposures to which Plaintiff has and would be exposed could cause Plaintiff death or even injury.

13. While Mr. Echazabal does have a chronic liver condition which is not correctable, there is no evidence that his liver condition has not improved. Mr. Echazabal was treated with interferon, a standard treatment for his condition; it is not an "aggressive" treatment as suggested by Dr. McGill at paragraph 13 of his Declaration. The only way to establish whether there has been an improvement in Mr. Echazabal's liver is to conduct serial liver biopsies. A singular biopsy which Mr. Echazabal did undergo merely confirmed the diagnosis; it did not

determine whether Mr. Echazabal's liver condition has improved. The GGT, SGOT/AST, and SGPT/ALT enzyme tests do not and cannot establish whether an individual's liver condition has improved.

14. There is no medical or scientific evidence which supports the conclusion presented by Drs. Tang, Baily and McGill that Mr. Echazabal's health, and specifically his liver condition, were or would be placed at any appreciable or clinically significant degree of risk if he had been permitted to continue to work at the refinery or had been hired as the Plant Helper. Based on my review of Mr. Echazabal's past history of employment at the refinery, together with my review and evaluation of his medical file and the other evidence which I reviewed, coupled with my years of research, establish that his liver was functioning properly and that his continued employment at the refinery would not pose a risk or unusual health threat to Mr. Echazabal, nor would it cause any medically significant clinical change to his hepatitis C condition.

15. The matters stated in this declaration are true of my own personal knowledge, except as to matters stated on information and belief and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on this 11 day of November, 1997.

/s/ Gary Gitnick
GARY GITNICK, M.D., F.A.C.G.

DECLARATION OF MARIO ECHAZABAL

I, MARIO ECHAZABAL, hereby declare and state:

1. I am the plaintiff in this action. I first began working at Chevron's El Segundo, California Refinery (Refinery) in 1972. I worked from approximately 1972 until approximately December of 1975, when I left to perform other work not connected with the Refinery. In approximately January of 1979, I returned to work at the Refinery and remained working there until approximately February 28, 1996.

2. Throughout the period of time that I worked at the Refinery until approximately January of 1994, I worked primarily at what is referred to as the coker or coker unit. I worked as a laborer, helper, and pipefitter. Between approximately January of 1994 and approximately February 28, 1996, I worked on what is called the "fire watch." In this position, I worked throughout the Refinery including the coker, often in close proximity to persons who performed welding functions.

3. During the period that I worked at the Refinery, I worked for various maintenance contractors; I did not work for Chevron. Between mid to late 1986 and my last day at the Refinery in February 1996, the maintenance contractor at the Refinery for whom I worked was Irwin Industries, Inc. (Irwin).

4. In or about August 1992, I submitted an application to work directly for Chevron as a pipefitter/mechanic at the coker. At the time I submitted that application, I had been working primarily at the coker steadily for approximately 12 to 13 years. In fact, I was part of what was referred to as Irwin's "Killer Crew." This was a special group of maintenance employees who were called in at any time of day to perform whatever maintenance functions were necessary to ensure that the coker unit could be maintained in an operating capacity.

5. In October 1992, Chevron informed me that my pre-employment interview was successful and that I had been scheduled for a pre-employment physical examination. I received a letter from Chevron dated October 8, 1992, attached hereto as Exhibit D and incorporated, in connection with my 1992 application. I underwent a medical examination in October of 1992; Chevron's Dr. Philip Baily performed the medical examination. After the exam, Dr. Baily advised me that I had a medical problem. Dr. Baily never told me that I should not work in the Refinery. Dr. Baily told me that I should see my own doctor to have my medical condition evaluated. I did so.

6. In the years following my discussion with Dr. Baily, I saw four different doctors on my own in connection with my medical condition. Those doctors were Drs. Sanchez, Ha, Suchov, and Weingarten. During my discussions with the doctors, I recall telling each of them the type of work I did. None of these doctors ever advised me that I should not work in the Refinery because of my medical condition. To the best of my recollection, in 1993 I believe I learned through Dr. Ha that I had a liver problem. Eventually I learned I had hepatitis C.

7. Although I had a successful interview in connection with my application, I was never hired by Chevron in connection with my 1992 application. Nevertheless, I remained employed working for Irwin at the Refinery primarily working in the same location – the coker – working around the same chemicals, liquids, solvents and fumes that I had been since I began working at the Refinery. My duties did not change until early 1994.

8. Between my October 1992 pre-employment medical examination and October of 1995 when I again applied for employment with Chevron, I was asked by Chevron's doctors and/or its medical clinic staff to keep providing them with information concerning my condition, which I did; likewise, I was interested in providing Chevron with information hopeful that I would eventually get hired by Chevron. During 1993,

1994 and 1995, either I hand delivered medical reports/records to the Chevron clinic or my doctors mailed it to the Chevron clinic. In addition, I was also asked by Chevron to give a further blood test during this period, which I did on at least one occasion. Attached hereto collectively as Exhibit E and incorporated are copies of various medical records prepared by my doctors which were submitted to the Refinery medical clinic, some of which I personally brought to Chevron's clinic.

9. In October of 1995, I once again applied for employment with Chevron, this time as a plant helper at the coker unit (Helper). As before in 1992, I received a written letter from Chevron advising me that I need to complete a pre-employment physical examination. The physical examination was set for January 2, 1996. A copy of the letter which I received, dated December 28, 1995, is attached hereto as Exhibit F and incorporated. As requested, I underwent that Chevron examination in January of 1996.

10. On February 28, 1996, I received a letter dated February 6, 1996 from Chevron informing me that they had decided to withdraw their offer to hire me as a Helper. I had not received any notification from Chevron or Irwin before this date that the job Chevron offered me in December of 1995 had been withdrawn. A copy of that letter and certified card is attached as Exhibit G and incorporated.

11. Between February 6 and on or about February 27, 1996, I continued to work at the Refinery performing my duties on the fire watch throughout the Refinery exposed to the same chemicals, liquids, solvents and fumes I had previously been exposed to.

12. On or about March 8, 1996, I talked with Mr. Manny Kiesser, whom I understood was in charge of Personnel for Irwin (Kiesser). Mr. Kiesser told me to go to the Long Beach Medical Clinic (Clinic), which I did. I believe on or about March 8, 1996, while at the Clinic, my height, weight and a few

of my vital signs were taken by a medical assistant. I do not believe that I ever met with nor was I examined by any doctor while I was at the Clinic. After waiting at the Clinic for awhile, I was finally given a sealed envelope to take back to Mr. Kiesser, which I did later that afternoon when I returned to the Irwin employment office on Redondo Avenue.

13. Upon my return to Irwin, I handed Mr. Kiesser the sealed envelope. He opened the envelope in my presence, read the results to me, and thereafter provided me with a copy of the report which had been contained in the sealed envelope.

14. I was present at Mr. Kiesser's deposition. I heard him testify about certain things he said to me and/or certain things we discussed after I had gone to the Clinic. His representations as to what he said to me and/or what we discussed are wrong. He did not tell me or request or suggest that I go to a medical doctor/specialist, nor did he ask or did we discuss me providing Dr. Tang or Mr. Kiesser with additional information. Mr. Kiesser did not request or ask me whether I would be willing to take a position other than as a pipefitter. He did not ask and we did not discuss whether I would be willing to take a job as a laborer or as a helper, work on a part-time basis, or work local or out-of-town. Mr. Kiesser did tell me that there was no work then available, and if I wanted to work, I should come in or call in the future to find out about possible jobs.

15. Following my discussion with Mr. Kiesser the afternoon I went to the Clinic, I did go into Irwin's office located on Redondo Avenue in Long Beach and I also called in to find out about employment opportunities. I was continually told that there were no employment opportunities available for me.

16. Since my visit to the Clinic and my last meeting with Mr. Kiesser, I have not been offered any employment by Irwin or Chevron. I have remained ready, willing and able to work for Chevron or Irwin in any position for which I am qualified. I am

capable of working in the position of pipefitter, mechanic, helper and laborer and have done such work.

17. I have read and am familiar with the job duties of the plant helper, the position for which I applied in October of 1995 (Exhibit 16 attached to Dr. McGill's Declaration). I was also present at Mr. DiPadua's deposition where he described the duties of a plant helper. While working at the Refinery and specifically at the coker, I did many of the same jobs that the plant helper did and worked directly in the same work locations that a plant helper worked, exposed to the same chemicals, liquids and vapors.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 10 day of November, 1997 at Long Beach, California.

/s/ Mario Echazabal
MARIO ECHAZABAL

[EXHIBIT E TO DECLARATION OF MARIO ECHAZABAL]

California
Primary Physicians
Medical Group

Huntington
Medical Group
Incorporated

April 5, 1993
Phillip E. Bailey, M.D.
Regional Physician
Medical Department
Chevron Corporation
P.O. Box 97
El Segundo, CA 90245-9952

RE: Mario Echazabal
524-70-7651

Dear Dr. Bailey:

Mr. Echazabal is 47 year old patient who was seen by me first time on February 16, 1993 for evaluation of his abnormal liver function tests. Patient has history of heavy alcohol intake for about 10 years, however has stopped drinking the day before Christmas of 1992. He has been asymptomatic with no jaundice or swelling of the abdomen or extremities and never had a history of GI bleeding.

On physical examination of February 16, 1993 he was found to have no abnormality with normal vital signs and abdominal examination reveals no hepatomegaly or ascites. The skin reveals no spider angioma or rashes. His neuro examination is completely normal.

His lab tests reviews pro-time of 12.4 with INR of 1.1 which is considered normal. His CBC is normal with very slight elevation of hemoglobin to 17.5, platelet count is normal, the liver function test done prior to seeing me on January 22, 1991

showed GGT's 181, SGOT's 177, SGPT's 494 alkaline phosphatase 164.

The hepatitis screening including hepatitis A, Hepatitis B surface antigen and antibody are all negative.

In my opinion the patient now is capable of carrying on with the work that he has applied for and there is no restriction on his activity at work as outlined by the working condition sheet GO-308 that was sent to me.

Since patient has discontinued drinking alcohol completely his prognosis should be very good.

I will be following him in the clinic regularly every two months and monitoring of his liver function tests.

If I can be of any assistance regarding this patient's employment please do not hesitate to contact me.

Sincerely yours,

/s/ Nga Ha, MD
Nga Ha, M.D.
Internal Medicine

NA/bn

Health Care Partners
Medical Group
1025 West Olympic Boulevard
Los Angeles, CA 90015

November 10, 1993

Chevron Corporation
Philip Bailey, M.D.
Regional Physician
Medical Department
P.O. Box 97
El Segundo, CA 90245-9952

RE: ECHAZABAL, MARIO
SS#: 524-70-7651
MR#: 1-H102214

To whom it may concern:

The purpose of this letter is to clarify the medical situation of Mr. Mario H. Echazabal.

The patient has been evaluated from the gastrointestinal and hepatic point of view for abnormal liver function tests. His workup has been extensive and has disclosed evidence of what appears to represent chronic active hepatitis, Type C. The patient underwent liver biopsy and at this point will be initiated in treatment with Interferon at the dose of 3,000,000 three times weekly.

The patient is aware of the potential side effects of his treatment which are essentially general malaise, low grade fever, myalgias, which are usually well tolerated.

The patient poses no risk for co-workers and there is no limitation of his ability to work.

If any further information is required regarding this patient, would be happy to answer any questions.

Sincerely,

/s/ Suchov MD
Mordo Suchov M.D.
Gastroenterology and Hematology

◆

Health Care Partners
Medical Group

July 20, 1994

Chevron Corporation
Medical Department
P.O. Box 97
El Segundo, CA 90245-9952

RE: ECHAZABAL, MARIO
SS#: 524-70-7651
MR#: 1-H102214

To whom it may concern:

The purpose of this letter is to bring you up to date in the care of Mr. Mario Echazabal.

The patient is a very pleasant 48-year-old Hispanic male who has been diagnosed as having chronic active hepatitis C. The patient has received treatment with Interferon for six months with partial improvement in his condition. He will be treated further with the same drug for another six months. He has tolerated this well and indeed has shown significant improvement. The patient is aware of his condition and I am

writing this letter to specifically address the issue of his ability to work which is not impaired in any fashion. He is not contagious and therefore poses no risk to other employees of the company. This letter is written at the request of Mr. Echazabal and a copy of it will be delivered to him.

If any further information is required regarding this patient, I would be happy to address it.

Thank you very much.

Sincerely,

/s/ Suchov MD
MORDO SUCHOV, M.D.
MS:pf/ks

[EXHIBITS TO DECLARATION OF LARRY MINSKY]
[EXHIBIT J]

DEPOSITION OF DR. PHILIP BAILY
OCTOBER 27, 1997

[Page 30:23 to 31:21]

Q What was the – what specifically did you rely upon in reaching the conclusion that Mr. Echazabal should not be exposed to solvents or other liver toxic chemicals?

A Initially as of 10-13-92 I was relying on the fact that his liver function was grossly abnormal.

Q When you say liver function, you're referring to the three specific tests?

A Correct.

Q And the term liver function tests, do they actually – do those three tests actually test liver function?

A Yes.

Q They do. So if I were to pull a research or basic guide in the area of medicine dealing with the liver, and I looked up those three tests, the GGT, the SGO, and the SGP, they would all tell me those tests refer to liver function?

Mr. Gresenz: Objection. Argumentative.

The Witness: They are not the only tests. There are other tests. But these three tests are related to liver function. That's correct. Elevations of these tests can indicate damage to liver cells, and thereby release these enzymes into the bloodstream.

[Page 44:8-20]

Q Do you know what – did you make any attempt to ascertain what kinds of toxins to which Mr. Echazabal would be exposed to if he got hired on at the refinery?

A No, sir. And the reason I did not do that is that is not my role. My role was to make a medical representation to management with regard to any limitations that were appropriate. It was up to management to make a decision as to which job this gentleman was applying to, what exposure there is to the solvents. I was not saying whether he should be hired or not hired. In my medical opinion, and from a medical point of view, he should not be placed in a circumstance that exposed him. That could have been in the coker unit, or any unit in the refinery.

[EXHIBIT M]

DEPOSITION OF DR. KENNETH MCGILL
OCTOBER 30, 1997

[Page 48:7 to 51:22]

Q Did you ever have a discussion with Mr. Saner where you went over, and described the recommendations set forth on Exhibit 66?

A Well, I'll say yes, qualified by it wasn't to discuss whether to make the recommendation or not.

Q He just wanted to get an understanding of the liver function?

A An understanding, yes. I'm not sure what you're implying in your question.

Q I'm not trying to imply anything, sir.

A All right. Well, as long as we understand each other.

Q You said you had at least one discussion where you explained to Mr. Saner how the liver worked, he wanted to understand how it worked?

A That's right. I recall, you know, sitting down, and going through that.

Q Just the two of you?

A Yes.

Q Do you recall that occurring where you were discussing how the liver worked with respect to Mr. Echazabal with Mr. Saner on more than one occasion?

A I can't give a direct answer. And I'll give a parenthetical answer. Mr. Saner comes by the clinic maybe every second

day, informally walking through. And we could have talked to liver function, but not about the classification of Mr. Echazabal, you know, not about – do you understand what I'm trying to get across?

Q Do you recall ever having a discussion specifically with respect to Mr. Echazabal's application for employment, other than the one where you've identified as talking about the liver?

A Not specific regarding the classification or anything that it was accepted.

Q Did you ever tell Mr. Saner that you were attempting to reach Dr. Weingarten?

A I don't recall. Not really, because I was parenthetically pretty well doing that on my own.

Q Do you recall telling Mr. Saner that you were in the process of – let's back up for a second.

A Mm-hmm.

Q Take a look at Exhibit 66. It says, "Date examined, January 2, '96." Do you see that?

A Yes.

Q And then it says – there's an arrow, and it says, "Completed, January 29, '96."

A Yes.

Q What had been completed by January 29, 1996?

A This form. This implies that this form was completed.

Q Had you talked to Dr. Weingarten by January 29, 1996?

A As I say, I can't recall the time lines on that. I might not have.

Q You just don't know?

A I just don't know.

Q Do you know whether or not you had completed – whether you had had your discussion with Dr. Weingarten before the 10th of February?

A I really can't put a date on it, seriously.

Q Do you recall whether or not you had spoken to Dr. Weingarten before you received the February 28th letter?

A Yes.

Q That you feel comfortable with?

A Yes. Because that was – let me add, the letter was in reply – my feeling was that this letter was in reply to my briefly having talked to him.

Q Now, you received this letter on the 12th of March; is that right, of 1996?

A The stamp there, it looks like March.

Q So sometime – strike that.

Other than Dr. Weingarten, do you recall talking to any other physician, other than Dr. Bridge and Dr. Weingarten, did you speak to any other physician concerning Mr. Echazabal?

A I think the answer is no.

Q When you spoke to Mr. Weingarten – excuse me – Dr. Weingarten, did you discuss with him which specific chemicals or which –

A No.

Q – specific hydrocarbons he would be exposed to?

A No.

Q Did you tell him – did you discuss with Dr. Weingarten any kind of concentration levels?

A No.

Q Did you know at that time what the concentration levels of the chemicals or exposures he would have?

A Not in detail, no.

[Page 53:13 to 62:10]

Q Was your knowledge as to the concentration levels, the amount of hydrocarbons to which Mr. Echazabal would be exposed to as plant helper, limited to what you read on Exhibit 14?

A A little more than that through having had contact with workers in that area when they come to the clinic for various reasons, shall we say.

Q What was the little more than that?

A That they, you know, work with the coke, and had to drill into the coke barrels, and were in close contact. That they use some kind of a chemical, cleaners, and they use some kind of a rust preventative chemical that's like a solvent, and that they're in very close contact the coke plant helpers. They handle the materials I think on the conveyor belts, and that general information.

Q Do you know what the hydrocarbon, actual hydrocarbon exposure were, levels of those hydrocarbons?

A No. Not as figures, no.

Q Do you know whether or not the workers employed as plant helpers were exposed to hydrocarbon levels beyond OSHA regulations? In other words, in excess of OSHA regulations?

Mr. Kardassakis: The question assumes there's OSHA regulations to every chemical they're exposed to.

By Mr. Minsky:

Q With respect to any chemicals or solvents to which a plant helper is exposed at the coker, are you aware if any regulations which do exist are exceeded?

Mr. Kardassakis: Ambiguous. And no foundation.

By Mr. Minsky:

Q You can answer, Doctor.

A No, I'm not aware.

Q You're aware that there is an industrial hygiene department at the refinery?

A Yes. At the refinery.

Q Did you ever attempt to contact anybody within the industrial hygiene department to give you any input as to whether or not the industrial setting at the coker would be harmful to Mr. Echazabal?

A Not at that time we're talking about.

Q January of 1996?

A Yes. Right.

Q Did you ever?

A No.

Q Had you ever done it prior to that time with respect to the plant helper position?

A No.

Q Did you contact anybody to give you any kind of input, assistance, or guidance, or help in determining what the actual exposures would be to somebody employed as a plant helper working at the coker?

A Well, I was inquiring, addressing the question that had been posed. I don't know how it was posed of this, if there was any possibility of protecting Mr. Echazabal.

Mr. Kardassakis: I think he's talking about the time frame up to January or February of '96.

By Mr. Minsky:

Q Correct?

A Yes. Right.

Mr. Kardassakis: That's the time period he's talking about.

The Witness: I've lost the question again.

Mr. Minsky: Find the question, please, and read it back.

(Question read back.)

The Witness: You want a straight yes or no answer, and I'll say no.

Mr. Minsky: You want to take a break?

Mr. Kardassakis: Yes. Whenever is convenient.

(Off the record.)

Mr. Minsky: Back on the record.

By Mr. Minsky:

Q Doctor, what kind of specialty would you characterize yourself as having in the area of medicine?

A You mean officially with a ticket?

Q How would you characterize it? Do you call yourself an internist?

A No. I'm a generalist in the past. Now, you know, doing industrial medicine just through self-training, not a board certified or anything.

Q Doctor, in your practice, how often would you say that you have seen patients with any kind of chronic liver disease?

A Way in the past would be as a family doctor, as a general practice. Goodness, I wouldn't know how to estimate it.

Q Let's try it differently. Within the last 15 years, how often would you say that you see a patient who has chronic liver disease on an annual basis?

A I'm not treating.

Q I said see. I didn't say treat.

A See. Okay.

Q Let's clarify that. Have you been treating any patients at all within the last 15 years?

A Not outside of industrial injuries for – well, not outside of industrial injuries.

Q What do you mean by treating industrial injuries? What kind of treatment do you provide?

A Assessment, diagnosis, and treatment follow-up, and eventually completing the case.

Q Have you treated any patient with chronic liver disease in the last 15 years?

A No.

Q Have you seen any patients, other than Mr. Echazabal, who – in the last 15 years, who has been diagnosed with chronic liver disease?

A That's difficult to answer. I guess that I'd probably have seen an occasional one.

Q I don't want you to guess, Doctor. Do you have any recollection of seeing any other patient, or any other individual, other than Mr. Echazabal?

A Okay, 15 years is '82. Well, I can't recall. It's too far back.

Q Have you seen any individual who has a liver condition, other than Mr. Echazabal, within the last 15 years?

A Isn't that the same question?

Q No. I've asked you about chronic.

A Chronic or acute?

Q I didn't say acute. I said chronic.

A Uh-huh. Well, again, you know, we have to pay attention to the seeing. There have been patients, or there have been employees at Chevron that have had acute liver disease. We don't treat them, but we're concerned with their contagiousness. And so that we handle the work responsibilities of following their problem. Is that clear to you?

Q Let's see if I can understand it better.

A All right.

Q How many individuals would you say you have seen in the last 15 years who have acute liver disease that worked at Chevron?

A I wouldn't be able to estimate it.

Q Do you believe it's more than ten? Let's bring it down. How about the last five years?

A Well, it certainly wouldn't be more than ten in the last five years.

Q More than five?

A It might be around that, as a guess.

Q I don't want you to guess.

Mr. Kardassakis: You can give an estimate.

The Witness: A guesstimate, let's say five. Sure.

By Mr. Minsky:

Q So when you say, "Let's say five," you're just assuming that you probably saw that many people, or you're coming up with a guesstimate?

A Guesstimate.

Mr. Kardassakis: Argumentative.

By Mr. Minsky:

Q Is that a guesstimate?

A Right.

Q Do you have any specific recollection of actually following up, as you've referred to it, seeing an individual with acute liver disease? Do you recall actually seeing or following up with any Chevron employee in the last five years who had acute liver disease? In other words, is there a specific recollection of at least one?

A Yes. But following up just entails, you know, when they can return to work after they're not contagious. I don't have anything to do with the treatment.

Q But nobody for any kind of chronic liver disease; correct? In the last five years?

A That's right.

Q Are there different – let's go back now to the 15 year period.

Within the last 15 years, have you seen any patients, when I say patients, I'm talking about an employee or applicant.

A All right.

Q Who had a different kind of chronic liver disease, other than hepatitis C that Mr. Echazabal had?

A No.

Q Doctor, are you aware of any evidence which shows or connects hepatitis C – strike that.

Are you aware of any evidence that shows that a person with hepatitis C is at any greater risk of liver failure than someone with no such diagnosis?

Mr. Karadassakis: Incomplete hypothetical. Ambiguous as phrased.

By Mr. Minsky:

Q You can answer, Doctor.

A No opinion.

Q You have no opinion? You're not aware of any evidence – are you aware of any evidence in the literature which shows that a person with hepatitis C is at any greater risk for liver failure –

Mr. Kardassakis: It's still ambiguous.

Mr. Minsky: – than someone who has no such diagnosis?

Mr. Kardassakis: Same objections.

The Witness: Someone that doesn't have the disease, you mean?

By Mr. Minsky:

Q That does not have the diagnosis.

A They're at greater risk for liver failure? They should be.

Q So it's your understanding that someone who has hepatitis C, there's a greater likelihood that they will have liver failure than someone who does not have hepatitis C; is that what you're saying?

A But have some other type of liver disease?

Q A person who has no liver disease versus a person who has hepatitis C. Is the person who has hepatitis C at a greater risk of having liver failure than the person who has no liver disease?

A Yes. He's at greater risk.

Q Are you aware of any evidence which shows that a person with hepatitis C is at any greater risk for liver failure after exposure to hepatotoxins?

A Let me hear the question again.

Q Are you aware of any evidence in the literature which shows that a person with hepatitis C is at any greater risk for liver failure after exposure to hepatotoxins?

A I couldn't quote any specific literature, no.

Q Did you conduct any research into that area in connection with your recommendations concerning Mr. Echazabal?

A No.

[Page 73:18 to 74:5]

Q Doctor, how quickly did you think there would be a change in Mr. Echazabal's condition if he were hired and permitted to work as a plant helper?

Mr. Kardassakis: Ambiguous.

Mr. Turner: Calls for speculation.

The Witness: I couldn't estimate that.

By Mr. Minsky:

Q Did you come to any kind of opinion as to how soon there would be any kind of change in Mr. Echazabal's condition, liver condition if he had been hired into the position of plant helper?

A No. I couldn't place a time limit, or sequence on it.

[Page 86:4-11]

Q And again, you relied simply upon the three enzyme tests; right, and the substance you knew, where you understood he was going to be, at the coker?

A Right.

Q The three tests, the GGT, the SGOT, and the SGPT, they're referred to as liver function tests; is that right?

A Correct.

[Page 98:4 to 100:24]

Q Doctor, do you know precisely what chemicals Mr. Echazabal worked around in the coker, other than what you described? You mentioned a few solvents, and so forth. Do you know what chemicals he was working with?

A I don't know them precisely.

Q Doctor, are there hydrocarbons – do you know if it's possible in our day and age to avoid hydrocarbons?

A Well, I can't answer that question. How do you mean?

Q Do you know whether –

A When you fill up your car with gas.

Q So at what point would it be improper – strike that.

Did you ever recommend to Mr. Echazabal not to be exposed to any hydrocarbons?

A Echazabal himself?

Q Yes.

A I don't think so.

Q Was there a certain level of hydrocarbon exposure that was acceptable in your mind, but beyond that, it was not acceptable?

A No. I didn't have any levels in my mind.

Q Did you consider that?

A Specific levels.

Q As you say you go fill up a car, and you'll be exposed to hydrocarbons.

A Right.

Q Did you consider in your recommendation as to work restriction as to what level of hydrocarbon exposure he could be safely exposed to without endangering further his liver?

A To my mind, it would entail also, you know, the time, over time, with small exposure. Over a longer time could have an adverse effect. And then the other thing, you know, in my mind at the time was that although there's considerable effort

to avoid it, there are sudden accidental leakages, and even explosions, and so on that occur in the refinery. And that these plant helpers are working intimately with the equipment that might be leaking unnoticed etc. But you know, as far as specific metrics as to what the levels are, you know, just the safety people are supposed to be looking after, that issue.

Q Did you contact anybody in safety to determine whether or not Mr. Echazabal could work in the coker?

A Not directly.

Q Indirectly?

A Well, no.

Q Doctor, I don't understand something, and maybe you can clarify it for me. You said you were concerned about the adverse effect to the exposure of hydrocarbons over time; correct?

A Mm-hmm.

Q How long a period of time were you – are you talking about there? You said over time. Three weeks? Three months? Three years? Three decades?

A I really don't have any specific period of time in my mind. It's just a common sense-type of view, that you know, small exposures over a longer period of time could add up to a brief large exposure.

Q So you didn't believe or did you believe that there was imminent danger to Mr. Echazabal if he continued to work in the refinery for let's say two or more weeks?

Mr. Turner: Objection. Incomplete hypothetical.

Mr. Kardassakis: Join. Also ambiguous as phrased.

The Witness: No answer.

Q Did you think that his liver condition would change in any manner if he continued to work in the refinery for the rest of the year of 1996?

A Yes. I thought it could.

[Page 106:24 to 108:14]

Q Dr. McGill, you indicated that you had had a telephone conversation with Dr. Weingarten sometime after January 10th, 1996. Do you recall that?

A Yes.

Q And Dr. Weingarten, I guess, in response to a statement of yours in that conversation indicated that he was of the opinion that Mr. Echazabal should not be exposed to hydrocarbons?

A That's right. The same statement that's in his letter.

Q Did that mean – did you understand that to mean that Mr. Weingarten agreed with you that there should be a work limitation on Mr. Echazabal concerning working in the refinery around hydrocarbons?

Mr. Minsky: The question is ambiguous. It is speculation as to what he means, what he assumed.

The Witness: Now, my understanding of what you're asking is did I discuss with Mr. Weingarten the issue of limitations. And the answer to that is no. I didn't discuss limitations with him.

By Mr. Turner:

Q At the time that you had the conversation with Dr. Weingarten that we're just speaking of, either during that conversation or shortly after that conversation, did you form the opinion that Mr. Echazabal should not work in the refinery?

Mr. Minsky: Can you reread the question?

(Question read back.)

Mr. Minsky: Question is ambiguous. Compound.

The Witness: Well, should I try to answer it?

By Mr. Turner:

Q Yes, please.

A No. As I remember the time sequence, you know, my decision had been made prior to talking to Dr. Weingarten. That – well, as you said shouldn't work in the refinery. Actually, what we were doing was placing such limitations on him, which would mean he wouldn't work in the refinery.

Q Thank you.

A Does that answer the question?

Q Yes, it does.

[EXHIBIT N]

DEPOSITION OF WILLIAM SANER
SEPTEMBER 10, 1997

[Page 34:6-16]

Q Did you and Dr. McGill discuss the concentration levels of the hydrocarbons – you were focusing on the hydrocarbons to which Mr. Echazabal would be exposed if he got hired for the position, right, or did you not discuss the concentration levels?

A We didn't discuss absolute concentration levels; no.

Q Well, I'm not asking about absolutes.

A We did not.

Q You didn't discuss concentration levels?

A No.

[Page 49:2 to 51:16]

Q In your discussions with Dr. McGill, did he suggest to you that it would be a risk to Chevron if Mr. Echazabal would be hired?

A We discussed his limitations, and as I said, the end indication, the process of how the liver functioned, how it absorbs and handles chemicals, hydrocarbons, toxins, that sort of thing that he would be exposed to. Jointly we concluded there would be risks.

Q And the conclusion was that the risk would be too high to employ him?

Mr. Turner: Objection. Vague and ambiguous.

Mr. Minsky: You can go ahead and answer.

The Witness: We jointly concluded there were significant risks if we hired Mr. Echazabal; correct.

By Mr. Minsky:

Q Did you conclude that those risks – what exactly were those risks, first of all? Let's clarify that.

A The risks would be exposure to hydrocarbons, assorted chemicals, solvents, toxins; and that based on the medical evaluation of the functionality of the liver, that he may not be able to cleanse his body with the existing capacity of his liver.

Q Anything else, sir – any other risks?

A No.

Q Were you concerned about a risk of harm or injury to anybody else other than Mr. Echazabal?

A No.

Q So if I understand you correctly, Dr. McGill basically laid out for you or explained to you his understanding of how the liver worked and how the exposure to these solvents and hydrocarbons and toxins would affect Mr. Echazabal's liver or might affect Mr. Echazabal's liver; correct?

A Correct.

Q Dr. McGill, did he tell you that in fact the exposure to these toxins and hydrocarbons and solvents would in fact cause injury, further injury to his liver, Mr. Echazabal's liver?

A I don't recall if he said it in fact would cause.

Q So the discussion was more in terms of what might happen?

A Right.

Q Then again, there was no specific indication from Dr. McGill that it was more likely than not that Mr. Echazabal's liver would deteriorate if he were permitted to be hired into the position that he applied for?

A Correct.

Q Were you aware, independent of Dr. McGill or in conjunction with your discussions with Dr. McGill, of the letters or reports that had been submitted by Mr. Echazabal's physicians to Chevron between 1992 and January 1996?

A I was aware that there was letters from his physicians in his medical file; correct.

Q Did you read those?

A No.

Q Do you know if Dr. McGill read them?

A Yes.

Q Did Dr. McGill discuss them with you?

A Yes.

[Page 53:15 to 54:25]*

Q To – you said you were aware Mr. Echazabal's doctors had written reports to Chevron?

A Uh-huh.

Q Did you ever learn that any of those physicians had indicated that Mr. Echazabal should not work at the refinery?

Mr. Turner: Objection. Vague as to time.

Mr. Minsky: You can answer.

The Witness: Again, I don't recall his physician stating he should not work in the refinery, through conversations I had with Dr. McGill.

By Mr. Minsky:

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* [Respondent has designated page 53, line 15, to page 54, line 25, of the Saner deposition transcript for inclusion in the Joint Appendix because respondent tendered these pages to the Ninth Circuit in a "supplement" to the district court record. However, petitioner is of the view that these passages are not properly included in the Joint Appendix because they were not part of the summary judgment record before the district court. See 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2716, at 282 (1998).]

Q Right. Were the medical reports of any of Mr. Echazabal's physicians ever considered by you in your decision to reject Mr. Echazabal's application for employment?

A I was relying on Dr. McGill's digestion of the letters from his physicians as well as the data he received from the physical that we most recently performed in '95 or '96 – I guess early '96, as well as the data from the previous physical and to pull all of those pieces of data togther to give me one recommendation on limitations.

Q So you don't know how much, if any, reliance Dr. McGill placed on any of the reports submitted by Mr. Echazabal's physicians; correct?

A I cannot tell you precisely the weightedness that he gave to these particular letters from the outside physicians.

Q In your discussions with Dr. McGill, he never articulated for you any particular weight that he himself had given to the reports of Mr. Echazabal's physicians; is that correct – in other words, he told you that he was aware that these reports had been submitted?

A Right.

[Page 55:1-15]

Q But he never articulated for you or submitted to you anything in writing where he explained his reliance or lack of reliance upon those reports; is that correct?

A That's correct.

Q By the way, your discussions with Dr. McGill, were they basically all verbal – not basically – were they all verbal?

A Yes.

Q Were they all face to face?

A Yes.

Q He never submitted anything to you in writing, other than in the documents that you have in front of you?

A That's correct.

[Page 93:12 to 94:22]

Q Do you know what chemicals or solvents or gases that the coke handler 3C is exposed to when performing the duties under the conveyor operator?

A Generally, but not specifically. I mean, I can't tell you that it's combinations of propane or butane or what, you know, but I can – I can tell if it's hydrocarbon vapor that you're in.

Q Well, do you know which vapor or which exercises or which activities that they will be placed in or they will be exposed to hydrocarbons – is every single activity going to place a 3C coke operator in exposure to hydrocarbons?

A Yes.

Q Every single activity?

A Yes.

Q And do you know what the monitoring levels of those are – do you know what the exposure levels are?

A I don't know the exact exposure levels; no.

Q Do you know whether or not they are high or low in terms of regulations?

Mr. Kardassakis: Vague and ambiguous.

By Mr. Minsky:

Q Do you know what the standards are with respect to the exposure to the hydrocarbons?

A I do not know the standards; no.

Q Do you know whether or not the exposure levels are high, are dangerous in terms of whether or not the employers are required to be – strike that.

Do you know whether the exposure levels – strike that.

I think you said you don't know what the exposure levels are at all; correct?

A Not the specifics; that's correct.

[Page 101:10 to 104:1]

Q Do you know if any monitoring studies were done to determine exposures to hepatotoxins that people working as a coke handler would experience while working as a coke handler?

A I do not know if there were exposure studies done pertaining to the hepatotoxins.

Q Do you recall whether or not anybody discussed the possibility of having a study done to determine the amount of the concentration of exposure, the concentration of the chemicals or exposure to levels which a coke handler 3C would be exposed – I'm talking about 1995, 1996?

A We did not discuss – potential studies you said?

Q Yeah, in other words, making a suggestion that somebody conduct the studies.

A We did not discuss that.

Q Did you talk to anybody at the refinery who may be knowledgeable about hepatotoxins and their existence in the refinery?

A I did not talk to anybody about hepatotoxins or their existence in the refinery.

Q Do you know if anybody else did?

A I don't know if anybody else did.

Q Did Dr. McGill suggest somebody should check to see exactly what kind of exposure to which Mr. Echazabal would experience if he got hired on the job?

A Can you rephrase that, please?

Mr. Minsky: Sure. Actually, why don't we read the question back.

(The record was read)

Mr. Minsky: Let's try the question again.

By Mr. Minsky:

Q Did anybody suggest, that you know of, of course, that a study be conducted or an evaluation be performed as to the amount of hepatotoxins or level of hepatotoxins to which Mr. Echazabal would be exposed if he got hired as a plant helper 3C?

A I did not recommend any studies nor did anybody discuss that with me.

Q So the concern about the hepatotoxins to which Mr. Echazabal should not be exposed was basically a general discussion rather than a specific discussion as to actual quantities or exposure levels; correct?

A Correct.

Q And the work limitation which Dr. McGill issued which was – I think it's on Exhibit 8 – no exposure to solvents or other liver toxic chemicals.

No one actually made any kind of assessment as to the precise solvents or – rephrase that.

Did anybody, that you know of, make a specific assessment as to which solvents or other liver toxic chemicals to which Mr. Echazabal would be exposed if he got hired?

A We use – to answer the question –

Q Do you want me to place it in front of you, sir?

A I know what that says. I've got to – repeat the question.

Q Did anybody, that you know of, make any specific assessment as to which liver toxic chemicals or solvents that Mr. Echazabal would be exposed to if he got hired in the plant helper position?

A Not the specific toxins or hepatotoxins he would be exposed to.

[Page 104:4-23]

Q As of the date you made the decision to withdraw the offer of employment to Mr. Echazabal, February of '96, do you know which hepatotoxins or chemicals actually existed specifically at the coker?

A Did I know?

Q Yes.

A Generally, yes.

Q Which were they – what were they?

A You had hydrocarbon vapors. There were cleaning solvents that they work with. There's coke dust. There's welding fumes from burning weld rod. There's steam that comes out of the coke drum; that contains hydrocarbon vapors. There's steam that comes off of the coke pit, from beneath the crane. There's steam and hydrocarbon vapors that come off of the conveyer belt with the hot coke, moving it from the pits to the storage area. There's greases that they deal with, oils and

greases for lubrication purposes. Those are the key ones that I can recall off the top of my head.

[Page 114:6-25]

Q If I showed you a list of the chemicals in the coker unit, would you know whether they are hepatotoxins?

A No.

Q Would you know what those chemicals are used for – how those chemicals are used?

A Some, yes; generally, no, probably.

Q Would you know what kind of protective devices are used by the employees when utilizing those chemicals, other than what you've generally told me before?

A No.

Q Did you learn from Dr. McGill whether Mr. Echazabal's liver condition was such that he had a life expectancy of five years, ten years, any number of years – in other words, did you discuss his life expectancy?

A Did not discuss that.

Q Did you discuss the rate at which his health or liver condition would deteriorate if he worked **[Page 115:1 to 117:13]**[•] in the refinery – in other words, if he got hired into the

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[•] [Respondent has designated page 115, line 1, to page 117, line 13, of the Saner deposition transcript for inclusion in the Joint Appendix because respondent tendered these pages to the Ninth Circuit in a "supplement" to the district court record. However, petitioner is of the view that these passages are not properly included in the Joint Appendix because they were not part of the summary judgment record before the district court. See 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2716, at 282 (1998).]

position – in other words, after a month, after a week, after a year, two years?

A He did not rate it with specific numbers; no.

Q Did he give you any idea as to how quickly Mr. Echazabal's condition would deteriorate?

A No, he did not.

Q Were you concerned about the risks of medical costs that might result if Mr. Echazabal's condition deteriorated?

A Absolutely not.

Q Did you discuss the possibility of allowing him to take the job and then just simply monitoring his condition?

A Based on the medical information that we had and the knowledge of the job, we did not consider that as an alternative.

Q Well, I have a little trouble with your answer. Let's go back to my question.

Did you discuss the possibility of monitoring his condition?

Mr. Kardassakis: He said "we did not consider that as an alternative." How could that be any more responsive?

Mr. Minsky: Because by that answer, I would presume the answer is, yes, he did discuss it and he decided not to do it because of those reasons.

The Witness: We did not discuss it with Dr. McGill; right?

By Mr. Minsky:

Q Yes, with Dr. McGill.

A We did not discuss that alternative of hiring and monitoring him.

Q Did you say "hiring" – is that what you said?

A Well –

Q – or "monitoring"?

A Monitoring; right.

Q Did you discuss that with anybody?

A I don't recall specifically having that type of discussion with anybody.

Q No one suggested that to you, in any kind of format, email, written communication?

A No.

Q Is there a reason why you did not consider that – in other words, did you think about it and reject it or did it just never come across your mind?

Mr. Kardassakis: Your question implies that there's some way to effectively medically monitor. There's no foundation for the question. I can't stop you from asking "did you discuss it," but the fact of the matter is there is no way to do it.

Mr. Minsky: There's no way to do what, counsel?

Mr. Kardassakis: There's no way to do this type of monitoring you're talking about.

Mr. Minsky: There's no way to conduct a medical monitoring, biological –

Mr. Kardassakis: In general, yes. Related to this specific condition, no.

Mr. Minsky: That's the position Chevron is taking in this lawsuit?

Mr. Kardassakis: You bet.

[Page 131:13-16]

Q The sole basis for which you precluded Mr. Echazabal from working for Chevron in 1996 was because of his medical condition; is that right?

A Correct.

———— ◆ ————

[EXHIBIT O]

DEPOSITION OF CHARLES BRIAN TANG, M.D.
JUNE 30, 1997

[Page 26:21 to 27:6]

Q Doctor, do you recall seeing any kind of job description detailing what kind of duties he would actually be doing at the refinery?

A I did not receive a job description.

Q Did you talk to anybody to find out what he would be doing at the refinery?

A I may have, but I don't remember.

Q Do you recall Dr. Socol getting any information as to what kind of work Mr. Echazabal would be doing?

A I don't remember.

[Page 33:12-18]

Q First off, doctor, do you know what the level of treatment was?

A Well, first of all, I don't know where he was, whether he – what type of work he's been doing, whether he's been exposed to hepatotoxins, what treatment he's been getting, so I wouldn't know how to answer that question, presently.

[Page 41:1-11]

Q How about you, Doctor? Do you have any background in toxicology?

A Well, I'm board certified in occupational medicine, trained in toxicology. Will probably be taking my toxicology boards and my Professor of Medicine at USC School of Medicine in the Department of Medicine.

Q You say you will be taking your boards?

A There is a special boards in toxicology, a sub-specialty.

Q Are you certified in toxicology?

A No, I'm not.

[Page 49:23 to 50:11]

Q And you can't give me any estimate as to what that probability is?

A I don't like to give numbers.

Q Whether you do or you don't, your opinion, based upon your experience in occupational medicine, years of working with people who deal with environments like this, you are saying you can't give me any likelihood of probability that he is going to have serious illness or death by being put back in that environ where there is hepatotoxic chemicals?

Mr. Kardassakis: Argumentative.

The Witness: I think you answered me that question for the tenth time, and I will give you the same answer. I'm not going to give numbers.

[EXHIBITS IN SUPPORT OF IRWIN'S MOTION FOR SUMMARY JUDGMENT]

[EXHIBIT 20]

DEPOSITION OF DR. PHILIP BAILY
OCTOBER 27, 1997

[Page 7:6-11]

Q Doctor, how would you characterize your medical specialty, if any? You say you're an internist?

A Actually, I'm Board Certified in preventive medicine.

Mr. Gresenz: Preventive or preventative?

The Witness: Preventive/occupational medicine.

[Page 26:4-14]

Q But as of October 13th, 1992 you had come to the conclusion that Mr. Echazabal had work limitations required because of uncorrectable abnormalities; is that right?

A Yes. My feeling at the time was that his medical problem was such that he should avoid exposure to solvents or other liver toxic chemicals in order not to exacerbate his liver problem.

Q Doctor, did you base that opinion upon the elevated LFT's?

A That is correct.

[Page 30:23 to 31:21]

Q What was the – what specifically did you rely upon in reaching the conclusion that Mr. Echazabal should not be exposed to solvents or other liver toxic chemicals?

A Initially as of 10-13-92 I was relying on the fact that his liver function was grossly abnormal.

Q When you say liver function, you're referring to the three specific tests?

A Correct.

Q And the term liver function tests, do they actually – do those three tests actually test liver function?

A Yes.

Q They do. So if I were to pull a research or basic guide in the area of medicine dealing with the liver, and I looked up those three tests, the GGT, the SGO, and the SGP, they would all tell me those tests refer to liver function?

Mr. Gresenz: Objection. Argumentative.

The Witness: They are not the only tests. There are other tests. But these three tests are related to liver function. That's correct. Elevations of these tests can indicate damage to liver cells, and thereby release these enzymes into the bloodstream.

[Page 42:23 to 44:20]

Q Now, being a physician in the clinic at the refinery, are you aware of the kinds of chemicals, and solvents, and liquids that an employee would be exposed to?

A I was aware that there was some exposure to solvents and other liver toxic chemicals in the refinery to some limited extent. It's impossible to run a refinery without that type of exposure.

Q Are you aware of any studies that somebody with elevated enzymes has, that their exposure to hepatotoxins would cause further injury?

A I don't have any specific studies to quote you other than most reasonable physicians would have made the same recommendations. That it should be obvious even to a lay person that if a person has liver function abnormalities or damage that they should avoid or limit exposure to any other substance that could damage their liver in the future.

Q You've also told me you're not a liver specialist?

A That's correct.

Q So what may seem on its face, may not be reasonable.

Mr. Turner: Objection. Argumentative.

The Witness: I have no answer to that question.

By Mr. Minsky:

Q Do you know what the concentration is to what the toxins, liquids, and vapors are in the refinery?

A No.

Q Do you know what are acceptable and not acceptable to persons?

Mr. Gresenz: Objection. Vague and ambiguous.

By Mr. Minsky:

Q Do you know what kind of hepatotoxins are at the coker?

A Not specifically.

Q Do you know what – did you make any attempt to ascertain what kinds of toxins to which Mr. Echazabal would be exposed to if he got hired on at the refinery?

A No, sir. And the reason I did not do that is that is not my role. My role was to make a medical representation to management with regard to any limitations that were appropriate. It was up to management to make a decision as to

which job this gentleman was applying to, what exposure there is to the solvents. I was not saying whether he should be hired or not hired. In my medical opinion, and from a medical point of view, he should not be placed in a circumstance that exposed him. That could have been in the coker unit, or any unit in the refinery.

[EXHIBIT 21]

DEPOSITION OF DR. KENNETH MCGILL
OCTOBER 30, 1997

[Page 37:3-18]

Q Were you fully familiar with all the job responsibilities, all the physical responsibilities of performing every single job in the refinery?

A We have, you know, a job description outline that we utilize.

Q So there were job descriptions, written job descriptions?

A Yes.

Q There was also, or was there a document at that time listing some of the physical requirements, or environmental demands of the particular job?

A Yes. All the physicians have that documentation.

Q That was in existence? Those kinds of documents were in existence between '88 and '93?

A Right.

[Page 41:8 to 45:24]

Q Between July of 1993 and today's date, have you ever, literally, talked on the telephone or in person, any doctor outside of Chevron concerning Mr. Echazabal?

A Yes.

Q With whom did you talk, doctor?

A What was his name? Sorry. Weinberger?

Q Weingarten?

A Weingarten. There we are.

Q When did you talk to Weingarten?

A That's sometime during the time between January 2nd, I think, it is on this form when Mr. Echazabal was at the clinic, and when I received a letter from Dr. Weingarten, which was I think dated around some date in February.

Q All right. Let me draw your attention to paragraph 9 of your declaration.

A Okay. That's what page?

Q Page 4.

A Okay.

Q Take a second, and read that, please.

A Okay. Let's go ahead.

Q Now, do you recall talking to Dr. Weingarten after you received the January 10 letter referencing paragraph 9?

A Could we have that exhibit so I don't confuse the letters. There was a letter dated January 10th and another dated in February. Wasn't it?

Q Exhibit 67 is a one-page document dated January 10, 1996.

A Right.

Q Now, you got this letter –

Mr. Kardassakis: I think he wanted to see both letters.

The Witness: Right. And do we have the exhibit of the letter I wrote the same date, January 10th?

By Mr. Minsky:

Q 68 is a one page letter dated January 10, 1996. And 69 is a one page letter dated February 28th, 1996.

A Very good. Thank you.

Q You've got these three letters in front of you. Now, drawing your attention to paragraph 10 of your declaration, you're referring to the letter you've wrote, which has been marked for this deposition as Exhibit 68; right?

A Right.

Q Correct me if I'm wrong, but I assume the letter between Dr. Weingarten and you passed in the mail; right?

A That's sure what happened.

Q So you get Dr. Weingarten's letter of January 10. When do you call Dr. Weingarten?

A Can't give you an exact date.

Q You don't recall?

A No. I don't recall when exactly.

Q Well, do you recall – do you have anything to refresh your recollection as to when?

A Let me elaborate on the sequence of these letters and contact. I think that would be better.

Q Before you do that, let me clarify. Did you actually speak with Mr. Weingarten, or did you speak with somebody from his office to get some lab results? Let me see if I can help you here.

A Well, I can answer it.

Q Okay.

A Both. I don't know if the lab results were his office or from the laboratory.

Q Okay. Go ahead, and tell me the sequence.

A Yes. As you pointed out, the two letters had crossed. Therefore, Dr. Weingarten wasn't replying to my letter. In fact, you know, it's a "To Whom it May Concern" letter. And therefore, I wanted to make sure that Dr. Weingarten either received the letter, and possibly forwarded it on to Mr. Suchov.

Q Sorry. Say that again. Repeat what he said.

(Answer read back.)

The Witness: Forwarded from Suchov.

By Mr. Minsky:

Q Go ahead.

A So I don't recall exactly the chain of events. But we determined that Suchov was no longer caring for Mr. Echazabal, and that Dr. Weingarten was the primary doctor at this time. And as the time was going by, I don't know when we got this January 10th letter, there's no date stamp on it, I called, and you know, got ahold of Dr. Weingarten briefly on the phone to try to straighten out the matter of whether he'd gotten my letter or not.

And at the time I spoke with him, my impression was that he hadn't got the letter forwarded to him, but that he would get it all right.

Q Go ahead.

A And so I had verbally either read the paragraph in my letter or paraphrased it asking him to respond to our concern. Let me scratch that, and put it a different way.

I wanted to make sure that he understood that our concern was the exposure to hepatotoxic hydrocarbons, and not the contagion issue which he had responded to in his letter here. And so I was able to get across to Dr. Weingarten that that was one of my interests, and he replied, paraphrased again, but pretty well as he replied in the subsequent letter that if that was the case then he shouldn't be exposed to these hydrocarbons. And I, you know, expected the forthcoming letter to follow-up my telephone conversation.

Now, I can't tell you the time sequence of that.

Q So you have no –

A It's in between there somewhere. It's just that, you know, I realized that this had crossed, and that this letter wasn't addressing our concern at Chevron about the exposure. And I wanted to make sure that Dr. Weingarten knew that that's what I wanted him to know. And would he please reply to that in addition to what he had in this January 10th letter. That's my best recollection of what occurred, and the sequence of how it happened.

[Page 53:13 to 54:6]

Q Was your knowledge as to the concentration levels, the amount of hydrocarbons to which Mr. Echazabal would be exposed to as plant helper, limited to what you read on Exhibit 14?

A A little more than that through having had contact with workers in that area when they come to the clinic for various reasons, shall we say.

Q What was the little more than that?

A That they, you know, work with the coke, and had to drill into the coke barrels, and were in close contact. That they use some kind of a chemical, cleaners, and they use some kind of a rust preventative chemical that's like a solvent, and that they're in very close contact the coke plant helpers. They handle the materials I think on the conveyor belts, and that general information.

Q Do you know what the hydrocarbon, actual hydrocarbon exposure were, levels of those hydrocarbons?

A No. Not as figures, no.

[Page 74:6 to 77:24]

Q Is it your understanding that, in fact, there would have been a negative change in his liver condition if he got hired into the position of plant helper?

A That's right. In fact, there would.

Q What did you base that conclusion on? What you understood to be the chemicals in the refinery at the coker, and the three tests, the GGT – well, the three liver function tests, that was it, right?

A Yes.

Q In looking back at the blood test results for those three enzymes, those three we just mentioned.

A All right.

Q Did you see any clinically significant change in the enzyme levels from 1992 to 1996?

A There were changes. But I'd have to look at the results. If you want to review that.

Q Here they are right here in your declaration. I believe you start off at page 5 referring to the October 1992, the GGT, the SGO, and the SGP tests. And then you have all the way up through the test results in front of you in 1996. Please take a moment, and look at the various tests.

A All right.

Q My question, again, Doctor, is, do you see any clinically significant difference in the test results between the 1992 lab reports and the 1996? And in saying that, I'm including all the other reports in the interim.

A Yes. Surely there's a difference.

Q There is a difference?

A Yes.

Q I'm asking if you believe that constitutes a clinically significant difference?

A Just in comparing the two? October 15, 1992.

Q No.

A Because they varied through time.

Q That's right.

A Sometimes it was better, sometimes it was worse.

Q That's right. And do you see any significant difference in the test results in those three tests between 1992 through 1996?

Mr. Turner: Objection. It's vague and ambiguous as phrased.

Mr. Kardassakis: I don't know what you're calling the three tests.

Mr. Minsky: The GGT, the SGO, and SGP.

Mr. Turner: It's still vague and ambiguous. Are you comparing the 1, 2, 3, 4, 5, 6, 7, 8 different lab reports in asking if there's a difference between each of those tests, and each of those reports?

Mr. Minsky: No. We can break it down.

By Mr. Minsky:

Q Let's just take the GGT.

A It varies. Each reading is going to be different.

Q Let's do it this way. Let's take the 1992, the first report, and the '96 report.

A These two on page 5?

Q Yes. In your opinion, is there a clinically significant difference between the GGT report in 1992 as opposed to that in 1996?

A Not the GGTP, it is essentially similar.

Q And how about the SGO?

A That's increased in the 1996 report.

Q Do you think that's clinically significant?

A That's enough difference to be significant, yes.

Q What do you consider enough to be clinically significant, what kind of a change?

A In that one they're both, you know, elevated, they're both abnormal.

Q I understand that we're talking about an elevation from one point to another point, which is also elevated?

A Another 25 points, it's 47, 18, that's about 30 points more.

Q So you think the GGT – there is no clinically significant difference in the two scores, but there is on the SGO?

A That's right.

Q Doctor, do you –

A SGPT – go ahead.

Q You believe that Mr. Echazabal's condition, and take a look at your declaration, in terms of the scores, let's just take – how about the June, 1993 scores noted on page 7 of your declaration. Are you there, Doctor?

A Yes.

Q Is Mr. Echazabal's liver enzyme test scores significantly high in your opinion that he should not be around hepatotoxic chemicals, liquids, or solvents as of the date of that report?

A Well, they're elevated, and certainly he shouldn't be around the hepatotoxic chemicals.

[Page 99:6 to 100:24]

Q Did you consider in your recommendation as to work restriction as to what level of hydrocarbon exposure he could be safely exposed to without endangering further his liver?

A To my mind, it would entail also, you know, the time, over time, with small exposure. Over a longer time could have an adverse effect. And then the other thing, you know, in my mind at the time was that although there's considerable effort to avoid it, there are sudden accidental leakages, and even explosions, and so on that occur in the refinery. And that these plant helpers are working intimately with the equipment that might be leaking unnoticed etc. But you know, as far as specific

metrics as to what the levels are, you know, just the safety people are supposed to be looking after, overall, that issue.

Q Did you contact anybody in safety to determine whether or not Mr. Echazabal could work in the coker?

A Not directly.

Q Indirectly?

A Well, no.

Q Doctor, I don't understand something, and maybe you can clarify it for me. You said you were concerned about the adverse effect to the exposure of hydrocarbons over time; correct?

A Mm-hmm.

Q How long a period of time were you – are you talking about there? You said over time. Three weeks? Three months? Three years? Three decades?

A I really don't have any specific period of time in my mind. It's just a common sense-type of view, that you know, small exposures over a long period of time could add up to a brief large exposure.

Q So you didn't believe or did you believe that there was imminent danger to Mr. Echazabal if he continued to work in the refinery for let's say two more weeks?

Mr. Turner: Objection. Incomplete hypothetical.

Mr. Kardassakis: Join. Also ambiguous as phrased.

The Witness: No answer.

By Mr. Minsky:

Q Did you think that his liver condition would change in any manner if he continued to work in the refinery for the rest of the year of 1996?

A Yes. I thought it could.

[EXHIBIT TO CHEVRON'S REPLY IN SUPPORT OF SUMMARY JUDGMENT MOTION]

DEPOSITION OF WILLIAM SANER
SEPTEMBER 10, 1997

[Page 150:14-24]

Q During this January and February 1996 time period, at some point in time did you have an understanding that Mr. Echazabal's physician had in fact recommended he not be exposed to solvents, toxins and the like?

A Dr. McGill instructed or told me that he had had that conversation and had that information and had that directed from his doctor; yes.

Q Did that impact, in any way, the decision that you made to withdraw the job offer?

A Very much so.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title omitted in printing]

ORDER GRANTING CHEVRON'S MOTION FOR SUMMARY JUDGMENT AND DENYING IRWIN'S MOTION FOR SUMMARY JUDGMENT

[Filed January 5, 1998]

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Defendants Chevron and Irwin's separate motions for summary judgment came on regularly for hearing on December 29, 1997. Having carefully considered the papers submitted and oral argument of counsel, the Court hereby GRANTS Chevron's motion for summary judgment, DENIES Irwin's motion for summary judgment, and GRANTS Irwin's motion for summary adjudication as to punitive damage claims.

This case arises from plaintiff Mario Echazabal's ("Echazabal") layoff from his position with Irwin Industries, Inc. ("Irwin"), a maintenance contractor for Chevron U.S.A., Inc. ("Chevron"), following Chevron's withdrawal of a job offer to Echazabal, allegedly on the basis of Echazabal's condition of chronic active hepatitis.

Echazabal filed a First Amended Complaint ("1AC") against defendants Chevron and Irwin in Los Angeles Superior Court on April 8, 1997. The Notice of Removal was filed May 8, 1997. Plaintiff alleges the following causes of action against defendant Chevron only, except as noted: (1) violation of FEHA for disability discrimination, against Chevron and Irwin;

(2) violation of ADA (42 U.S.C. §§ 12101), against Chevron and Irwin; (3) violation of 29 U.S.C. §794; (4) violation of plaintiff's right to privacy under Cal. Const. Art. I; (5) violation of the Confidentiality of Medical Information Act, Cal. Civ. Code § 56; and (6) intentional interference with contractual relations. The 1AC seeks punitive damages for all causes of action. (1AC 22:1-11.)

On October 6, 1997, defendant Chevron filed its Motion for Summary Judgment. Plaintiff's Opposition was filed November 14, 1997. Reply was filed November 24, 1997.

On November 18, 1997, defendant Irwin filed its Motion for Summary Judgment. Plaintiff's Opposition was filed December 1, 1997. Reply was filed December 4, 1997.

II. FACTUAL BACKGROUND

The following facts are relevant to both defendants' Motions for Summary Judgment and are undisputed, except as noted.

From in or about December, 1986 to on or about February 28, 1996, plaintiff Mario Echazabal was an employee of defendant Irwin Industries, Inc., at defendant Chevron's refinery in El Segundo, California ("the refinery"). (Irwin's Statement of Uncontroverted Facts and Conclusions of Law (hereafter "Irwin's Facts") 1.) Irwin is an independent contractor performing maintenance services at the refinery. (Chevron's Statement of Uncontroverted Facts and Conclusions of Law (hereafter "Chevron's Facts") 2.) Echazabal's training and background were in the job areas of pipefitting and firewatching. (Irwin's Fact 2.)

In 1992, Echazabal submitted an application to Chevron. In connection with that application, Echazabal underwent a medical examination in October, 1992, conducted by Dr. Philip Baily ("Baily"). (Plaintiff Decl. ¶4-5.) As a result of that medical examination, Dr. Baily concluded as of October 13, 1992 that Echazabal had an uncorrectable liver abnormality,

and should avoid exposure to solvents or other liver toxic chemicals in order not to exacerbate his liver problems. These recommendations were submitted to Chevron's personnel department. (Baily Depo. 13:11-15:1, 26:4-11, 30:4-9, 44:8-20, 47:11-48:4.)[1]

In or around November 1993, Dr. Kenneth McGill ("McGill"), Dr. Baily's successor, concurred with Dr. Baily's finding that plaintiff's liver condition was uncorrectable and that plaintiff should not be exposed to solvents and other liver toxic chemicals. (McGill Depo. 23: 6-13, 24:4-25:22.) A medical clearance letter sent to Dr. Baily by Dr. Mordo Suchov, dated November 10, 1993, states, "there is no limitation of his ability to work." (Pl. Supp. Decl. Exh. E p. 21.) However, this letter does not evaluate plaintiff's medical condition in light of any particular job description.

On October 11, 1995,[2] Echazabal applied for a plant helper position with Chevron at the refinery. (Chevron's Fact 1.) Prior to this application, but after 1992, Drs. Baily and McGill received medical records and reports concerning Echazabal's condition. (Echazabal Decl. ¶8.) At the time Echazabal applied for the job in 1995, he was working at the refinery as an employee of Irwin. (Chevron's Fact 2.) In that capacity, Echazabal performed similar job duties and was exposed to similar chemicals as would occur in the position of plant helper. (Echazabal Decl. ¶2, 4, 17; DiPadua Depo. 131-174; Saner Depo. 134:11-135:2.)

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[1] In Opposition to Irwin's MSJ (although not to Chevron's), plaintiff has presented a letter from a Dr. Nga Ha to Dr. Baily, dated April 5, 1993, which places no work restrictions on plaintiff as to the job plaintiff had applied for at that time. (Pl. Supp. Decl. Exh. E, p. 17.)

[2] This date incorrectly appears in Chevron's Facts and Echazabal's Responses as "October 11, 1997."

On December 28, 1995, Chevron offered Echazabal a plant helper position in the coker unit at the refinery subject to his completion of a pre-employment physical. (Chevron's Fact 3.) On January 2, 1996, Echazabal's pre-employment physical examination took place was conducted at the refinery clinic by Dr. McGill, a generalist "self-trained" in industrial medicine. (Chevron's Fact 4, Irwin's Issue 4, McGill Depo. 56:12-19.)

Echazabal suffers from chronic hepatitis C, a viral infection characterized by ongoing liver inflammation. (Fedoruk Decl. ¶5.) Dr. McGill reviewed Echazabal's medical records, including laboratory results from blood samples taken eight times between October, 1992 and January, 1996. Each of the blood tests showed elevated levels of liver function enzymes. (Chevron's 6.) It is disputed whether plaintiff's liver was in fact functioning properly, despite these elevated enzyme levels. (Fedoruk Decl. ¶8, Gitnick Decl. ¶7-8.) It is disputed whether such elevated enzyme levels reflect ongoing liver cell damage (McGill Decl. ¶11-12; Tang Depo. 54:21-55:8), or are simply evidence of liver inflammation and leaking of enzymes into the bloodstream, compatible with normal liver function (Fedoruk Decl. ¶8, Gitnick Decl. ¶7,9). Echazabal's enzyme levels had not improved despite years of treatment with interferon, the standard treatment for hepatitis C. (McGill Decl. 7, 9, 13.) Plaintiff has also presented evidence that although he has chronic active hepatitis C, he has no symptoms of liver failure, and there are no clinical findings on physical examination which demonstrate impairment of liver function. Plaintiff has presented evidence that blood tests which assess the ability of his liver to maintain normal body functions, including tests which measure albumin and prothrombin production by the liver, have been normal overall. (Fedoruk Decl. ¶5-8; Gitnick Decl. ¶6-14.) Although it is not clearly stated in the relevant declarations, the medical evidence creating these disputed issues is contained in opinions which appear to have been generated sometime after February, 1996. The Declarations of Drs. Fedoruk and Gitnick are both dated November, 1997, and

include a review of depositions and declarations pertaining to this case, all of which are dated 1997. (Fedoruk Decl. ¶4, Gitnick Decl. ¶4.)

Dr. McGill concluded that Echazabal's chronic liver condition was not correctable. (McGill Decl. ¶14.) Dr. McGill reviewed the written job summaries for the plant helper position in the coker unit, for which Echazabal had applied. (Chevron's Fact 10.) Chevron prepares and maintains such summaries for every job at the refinery. These summaries list the functions of the position in question and the environmental conditions an employee will encounter, although they do not designate the specific chemicals, solvents, or liquids, or concentration levels thereof, to which a person in a given job will be exposed. These summaries are used and relied on by the medical clinic when assessing whether applicants can safely perform the required functions of a particular job. (Chevron's Fact 11, McGill Decl. ¶7-8, Exh. 16-17 in support of Chevron's MSJ.) The summaries for the position Echazabal applied for list hydrocarbon liquids and vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases and chlorine bleach in the work environment. (Chevron's Fact 12.)

At some time after January 2, 1996 and before February 6, 1996, Dr. McGill spoke with Dr. Zelman Weingarten, M.D., one of Echazabal's personal physicians, about whether Echazabal could safely be exposed to the substances present in the refinery. (McGill Depo. 41:12-21, 50:13-22.) Dr. Weingarten communicated to Dr. McGill that Echazabal should not be exposed to such substances. (McGill Depo. 44:24-45:24.) Dr. McGill had sent a letter to Dr. Weingarten making such an inquiry, which Dr. Weingarten had not yet received. (McGill Depo. 44:12-22.) Upon receipt of that letter, Dr. Weingarten replied in a letter dated February 28, 1996, which also memorialized the earlier conversation. (McGill Depo. 50:22-24.) The February 28, 1996 letter read, in pertinent part, as follows: "In your letter, it is mentioned that Mr. Echazabal

has applied for return of his job and it is mentioned that 'this may entail exposure to hepatotoxic hydrocarbons.' This, of course, is recommended not to be the case." (Exh. 13 in support of Irwin's MSJ; Irwin's Fact 12; Chevron's Fact 21.) Dr. Weingarten was not informed by Dr. McGill about the specific chemicals to which plaintiff would be exposed, or the levels of concentration of those chemicals. (McGill Depo. 51:9-22, 53:9-54:20, 98:4-8.)[3]

Dr. McGill reviewed the medical history information provided by Echazabal identifying the substances to which he had been regularly exposed in the preceding six moths at the refinery. Echazabal identified exposure to insulation materials, welding and soldering fumes, coker dusts, solvents, cleaning fluids, and engine exhaust. (McGill Decl. ¶7, Exh. 12 in support of Irwin's MSJ.) Dr. McGill came to the conclusion that the hydrocarbons, chemicals, and solvents to which Echazabal would be exposed working as a plant helper in the coker unit would be dangerous to his health, or would aggravate his chronic liver condition. (Chevron's Fact 15.) Defendants Chevron and Irwin have presented admissible evidence that such a danger existed. (Tang Depo. 46:16-25, 47:1-25, 48:1-25; McGill Depo. 99:6-20, 100:21-24, 103:17-22.) Plaintiffs have presented evidence (based on evaluations apparently undertaken after February, 1996) that plaintiff was at no greater risk than any of his co-workers. (Fedoruk Decl. ¶9, 11; Gitnick Decl. ¶8-12.)

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[3] The February 28, 1996 letter explicitly updates and clarifies a January 10, 1996 letter form Dr. Weingarten which stated that Echazabal "has no limitations . . . . He does not pose a contagious problem." (Pl. Supp. Decl. Exh. E, p. 23.) The January 10, 1996 letter therefore does not undermine McGill's reliance on information received from Dr. Weingarten and memorialized in the February 28, 1996 letter.

On January 29, 1996, Dr. McGill discussed his conclusions with Chevron's Medical Director in San Francisco, Dr. Bridge. Dr. Bridge agreed with Dr. McGill's assessment that Echazabal could not safely work as a plant helper in the coker unit at the refinery. (Chevron's Fact 16.) Dr. McGill reached the same conclusions about appropriate work limitations as Dr. Baily had reached in 1992. (McGill Depo. 73:11-17.)

Dr. McGill reported to William Saner ("Saner"), Chevron Personnel Director, that "because of uncorrectable abnormality" [of liver function], if Echazabal were to be hired it would be subject to the work limitation, 'No exposure to solvents or other liver toxic chemicals.'" (Chevron's Fact 17; Exh. 15 in Support of Chevron's MSJ.) Dr. McGill also communicated to Saner that Dr. Weingarten had reached the same conclusion. (Saner Depo. 150:14-24.) Saner reviewed the written job summaries for the plant helper position in the coker unit. Exposure to hydrocarbons and chemicals is a necessary and inseparable part of the plant helper position. Based on these summaries, his own knowledge of the position, and Dr. McGill's medical opinion, (including the supporting opinion of Dr. Weingarten), Saner made the decision to withdraw Echazabal's conditional job offer. (Chevron's Fact 18; Saner Depo. 28:10-22, 46:3-47:4, 49:1-51:24.) Saner had not himself seen monitoring records regarding chemicals at the refinery, and to his knowledge no one evaluated which specific toxins and/or hepatotoxins Echazabal would be exposed to. (Saner Depo. 84:5-8, 93:12-94:22, 101:10-104:23.) During 1993, 1994, and 1995, Chevron never determined the precise level of each liver toxic substance to which coker workers would be exposed. (RFA Nos. 26-29.)

On February 6, 1996, in a letter from Saner, Chevron withdrew Echazabal's conditional job offer. Echazabal was notified of this withdrawal on February 28, 1996. (Chevron's Fact 19, Echazabal Decl. ¶10.)

Chevron sent a letter to Irwin dated February 21, 1996 which stated, "Your employee Mr. Mario Echazabal recently applied for employment at the Chevron U.S.A. Products Company. . . . [T]he results of Mr. Echazabal's examination indicate that he has a medical condition that would restrict him from performing the tasks of the position we offered. The restrictions require that Mr. Echazabal not be exposed to solvents and certain chemicals. It is therefore, with regret, that we have withdrawn our offer of employment to Mr. Echazabal. Further, we must ask you to immediately remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." (Exh. 14 in support of Irwin's MSJ.) Chevron did not expect, and did not intend, that the employment relationship between Irwin and Echazabal would terminate as a result of the February 21, 1996 letter. (Chevron's Fact 33.)

It is disputed whether it was not until late February, 1996 that Irwin first learned of Echazabal's chronic liver condition. Plaintiff reported "mild liver disease" in 1993 and treatment with interferon in 1995. (Echazabal Supp. Decl. Exh. Q; Minsky Supp. Decl. Ex. V.) Plaintiff has testified that he discussed "my liver condition . . . or the treatment I was undergoing" with his supervisors or someone from Irwin. (Echazabal Supp. Decl. ¶18-19.)

On or about February 28, 1996, Manfred Kiesser, Director of Human Resources for Irwin, complied with Chevron's instructions and, on behalf of Irwin, prohibited Echazabal from continuing to work in the refinery. (Kiesser Decl. ¶8-10.) Kiesser was not given any further information by Dr. McGill or Dr. Weingarten. (Kiesser Depo. 95:13-96:6, 108:19-109:24, 115:9-116:4, Exh. W to Minsky Supp. Decl.) After plaintiff's removal from the refinery, Kiesser sent Echazabal to the Long Beach Medical Clinic to determine Echazabal's work restrictions. (Kiesser Decl. ¶10-11, Echazabal Supp. Decl. ¶12.)

On or about March 8, 1996, Echazabal visited the Long Beach Medical Clinic. (Plaintiff Supp. Decl. ¶12.) It is disputed whether Echazabal was examined by Irwin's physicians, or seen by other medical personnel (non-physicians). (Chevron's Fact 20; Echazabal Decl. ¶12.) Brian Tang, M.D., who is board certified in occupational medicine and teaches that subject at USC Medical School, participated in the evaluation of Echazabal's test results. Dr. Tang concluded that exposure to liver toxins would harm and probably kill Echazabal. (Chevron's Fact 20.) Kiesser has testified that he learned from Tang that plaintiff could not safely work at any position in the refinery, though Tang does not specifically recall the communication. (Kiesser Depo. 95:8-12; Tang Depo. 50.) Plaintiff has presented admissible evidence that Tang's conclusion is erroneous.[4] (Fedoruk Decl.; Gitnick Decl.)

It is disputed what communication took place between Irwin and Echazabal respecting laborer or out-or-town job assignments. Defendant Irwin has presented admissible

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[4] In Opposition to Irwin's MSJ (although not to Chevron's MSJ), plaintiff has presented several doctors' letters which, according to plaintiff, "verify that despite Plaintiff's disability he was still able to work in the Refinery, [and] were a part of Chevron's medical file and reviewed by Dr. McGill." (Pl.'s Opp. to Irwin's MSJ, 11:26-28, footnote 8.) Plaintiff also states that "Dr. Tang reviewed and apparently disagreed with" these letters. (Pl.'s Opp. to Irwin's MSJ, 11:4-5.) A letter from Dr. Suchov, dated July 20, 1994, states that plaintiff's "ability to work . . . is not impaired in any way," and appears to have been written to address the issue of whether Echazabal posed any risk to any *other* employee. The letter does not discuss the job for which plaintiff applied in 1995, nor does it discuss exposure to any substances. (Pl. Supp. Decl. Exh. E, p. 22.) A January 10, 1996 letter from Dr. Weingarten is discussed at footnote 4, supra. The medical clearance letter from Dr. Ha did not pertain to the job offered to plaintiff in 1995, and plaintiff has presented no admissible evidence that that letter was seen by Dr. McGill or Dr. Tang.

evidence that Echazabal was informed of the availability of such positions, but that Echazabal failed to indicate to Irwin whether such positions were acceptable to him. (Kiesser Decl. ¶ 3.) Plaintiff Echazabal has presented admissible evidence he communicated his availability, but that no such offers were made. (Echazabal Supp. Decl. ¶14-16; Echazabal Depo. 199-201.) It is undisputed that Echazabal can work as a pipefitter, and do a variety of other forms of work. (Irwin's Fact 21.) It is disputed whether Kiesser requested that Echazabal discuss his work restrictions with his physicians, and have them provide input regarding what job functions he could perform. (Kiesser Depo. 63:24-25, 64:1-9; Kiesser Decl. ¶ 12; Echazabal Supp. Dell. ¶ 14-16.) It is disputed whether Irwin was provided with such input. (Kiesser Depo. 66:8-22; Kiesser Decl. § 13; Echazabal Depo. 215-24-216:6; Plaintiff Supp. Dec. ¶18-19; Minsky Supp. Decl. Exh. X, Z.) While it is undisputed that Kiesser told Echazabal to keep in contact for other job assignments, it is disputed whether Echazabal did so. (Kiesser Decl. ¶3, Exh.16; Echazabal Depo. 214:20-24; Echazabal Decl. ¶14-16.) Plaintiff has presented admissible evidence that many jobs were filled by Irwin after February, 1996, which fell within plaintiff's job capabilities, but that no such jobs were offered to Echazabal. (Minsky Supp. Decl. Exh. S; Echazabal Supp. Decl. ¶15-16.)

III. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted if the evidence supporting the motion for summary judgment shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails

to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

To avoid summary judgment, the non-movant must set forth specific facts showing that there remains a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. The non-movant "may not rest upon the mere allegations or denials of the adverse party's pleading." A factual dispute is "genuine" if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 242, 248 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Id.* at 255. If the nonmoving party's evidence is merely colorable or is not significantly probative, then summary judgment may be granted. *Id.* at 249-50.

IV. ANALYSIS

By its instant Motion for Summary Judgment, defendant Chevron seeks summary judgment in its favor as to all six of plaintiff's causes of action in the 1AC. In plaintiff's Opposition to Chevron's MSJ, plaintiff states that he has agreed to dismiss the Fourth and Fifth Causes of Action. Defendant Irwin seeks summary judgment as to the two causes of action in which it is a defendant, the First and Second Causes of Action. Therefore, the following analysis will address only the First, Second, Third, and Sixth Causes of Action, and the issue of punitive damages.

A. Chevron's Refusal to Hire Echazabal (First, Second, and Third Causes of Action)

1. Applicable Legal Standards

Plaintiff's First Cause of Action alleges that Chevron's withdrawal of Echazabal's job offer violated California's Fair Housing and Employment Act ("FEHA"), Cal. Gov. Code §12940. Plaintiff's Second and Third Causes of Action allege

that Chevron's withdrawal of Echazabal's job offer violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, respectively.

The substantive standards for determining liability under the ADA and the Rehabilitation Act are the same. *McDonald v. PA Dept. of Public Welfare*, 62 F.3d 92 (3d Cir. 1995).[5]

The Americans with Disabilities Act ("ADA"), 42 U.S.C. §12112, provides, in relevant part, that "(a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . hiring." Similarly, the Rehabilitation Act, 29 U.S.C. §794, provides, in relevant part, that "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995), the Fourth Circuit set out the elements of an ADA claim, which are also applicable to the Rehabilitation Act:

> In order to establish a violation of either of these statutes, a plaintiff must prove: (1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination solely on the basis of the disability. Regarding the second requirement, an individual is not otherwise qualified if he poses a significant risk to the

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[5] The two statutes' most important difference, not relevant to this case, is that the Rehabilitation Act pertains to federal employers and employers who receive federal funds, while the ADA extends to private employers. *Shiring v. Runyon*, 90 F.3d 827, 830 (3d Cir. 1996); *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995).

> health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation.

Doe at 1264-65.

The same analysis used in ADA claims is employed in FEHA claims. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996); *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 66 (1996). The FEHA, like the ADA, provides that

> (1) Nothing in this part shall prohibit an employer from refusing to hire . . . an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ . . . an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties . . . in a manner that would not endanger his or her health or safety . . . even with reasonable accommodations.

Cal. Gov. § 12940(a)(1); *see also* Cal. Gov. Code § 12940(d).

Under regulations implementing the ADA and case law interpreting it, an individual who poses a "significant risk" (also known as a "direct threat") to *himself* is also not "otherwise qualified" under the second prong of the above analysis. 29 C.F.R. § 1630.2(r); *see also Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995).

> The determination that an individual with a disability poses a 'direct threat' shall be based on individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and

severity of the potential harm; (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.

Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 763 (5th Cir. 1996). This "direct threat" analysis is equally applicable to ADA and Rehabilitation Act claims. *Daugherty*, supra at 698; see also EEOC Technical Assistance Manual § IV.5. California's regulatory scheme under FEHA is relevantly similar. Cal. Code Reg. § 7293.8(c), (d), and (f).

Thus under the ADA, the Rehabilitation Act, and FEHA, an employer may lawfully refuse to hire a disabled individual who is not otherwise qualified because the proposed employment poses a direct threat to the health of the employee himself.

2. Discussion

Chevron seeks summary judgment in its favor on Echazabal's First, Second and Third Causes of Action on the basis that Chevron's refusal to hire Echazabal was lawful, because Echazabal's liver condition made the position of plant helper a direct threat to Echazabal's health. Chevron's "direct threat" determination is therefore the sole issue in Chevron's Motion for Summary Judgment as to the First, Second, and Third Causes of Action.[6]

The elements of a direct threat analysis are set out in *Rizzo*, supra. Such an analysis requires an "individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a

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[6] For purposes of this Motion, Chevron does not challenge that Echazabal has a disability under the FEHA, ADA, or Rehabilitation Act. (Memo. of P. & A. 4:27, footnote 1.) Irwin does bring such a challenge in its MSJ, discussed below. Nor does plaintiff argue that "reasonable accommodation" could or should have been made by Chevron in Opposition to Chevron's Motion for Summary Judgment, although this issue is raised with respect to Irwin.

reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Rizzo*, supra at 763. The danger to the individual must be immediate, under *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1534 (9th Cir. 1995) (FEHA). The employer must gather "all relevant information regarding the applicant's . . . medical history and independently assess both the probability and severity of potential harm." *Mendez v. Gearan*, 956 F.Supp. 1520, 1527 (N.D. Cal. 1997) (Rehab. Act).

It is undisputed that Chevron came to the conclusion that such a direct threat existed on the basis of Dr. McGill's individual assessment of Echazabal's liver condition, supported by his consultation with Dr. Bridge, conversation (memorialized by correspondence) with Echazabal's physician Dr. Weingarten, and the earlier evaluation of Echazabal by Dr. Baily. All the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision in February, 1996, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed in the position of plant helper,[7] as posing a serious, immediate risk to him.[8]

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[7] The Suchov letter, presented by plaintiff in Opposition to Irwin's MSJ, although it places no work restrictions on plaintiff, does not evaluate plaintiff's medical condition specifically with respect to exposure to hepatotoxic substances, and does not indicate whether Dr. Suchov was aware that such exposure was contemplated. (Pl. Supp. Decl. Exh. E p. 21.)

[8] While plaintiff has presented admissible evidence from the Deposition of Chevron's Personnel Manager William Saner that he (Saner) was informed of future risks to Echazabal, other testimony in the same deposition makes clear that the risks communicated by Dr. McGill to Saner were *present* risks. (Saner Depo. 49: 21-50:2, 51:13-25.)

Plaintiff has presented evidence raising a genuine issue as to whether the position of plant helper would, in fact, have posed such a direct threat to Echazabal's liver condition or overall health. Indeed, plaintiff has presented evidence raising a genuine issue that despite elevated liver enzyme levels, plaintiff's liver function was normal, and that the substances to which he would be exposed in the position of plant helper posed no greater a danger to Echazabal than to other workers. (Fedoruk Decl. ¶4-29, Gitnick Decl. ¶5-29.) This evidence is contained in the Declarations of Drs. Fedoruk and Gitnick, and is based on their analyses. Although it is not clearly stated in plaintiff's filings or in the Declarations of Drs. Fedoruk or Gitnick, it appears that these analyses were undertaken sometime after February, 1996. The Declarations are both dated November, 1997. Dr. Fedoruk's analysis included a review of depositions and declarations pertaining to this case, all of which are dated 1997. (Fedoruk Decl. ¶4.) Dr. Gitnick's analysis involved the same documents, as well as Dr. Fedoruk's Declaration, which is dated November 4, 1997. (Gitnick Decl. ¶4.) Dr. Gitnick also evaluated blood tests dated as late as 1997. (Gitnick Decl. ¶7.)

While Drs. Fedoruk and Gitnick have both testified that the conclusions of Drs. Baily, McGill, and Tang are incorrect (Fedoruk Decl. ¶7, 26; Gitnick Decl. ¶8-12, 14), their evaluations were not performed until after the acts by Chevron and Irwin complained of by plaintiff.

In presenting a "direct threat" defense to a charge of discrimination under FEHA, the ADA, or the Rehabilitation Act, "[t]he assessment itself need not reach a medically unassailable conclusion; the law does not demand either omniscience or deuteroscopy." *Bento v. I.T.O. Corp. of Rhode Island*, 599 F.Supp. 731 (D.R.I. 1984). A "reasonable medical judgment that relies on . . . the best *available* objective evidence" is sufficient under *Rizzo*, supra (emphasis added). The evaluations of Drs. Fedoruk and Gitnick, even if correct,

were not available to Chevron or Irwin, and the evidence which was available to defendants supported their decisions.

The caselaw holds that an employer who refuses to employ an individual on the basis of medical information which turns out not to be completely accurate may nevertheless avoid liability. "A[n] employer is not required to be unfailingly correct in assessing a person's qualifications for a job . . . [Rather,] [t]he employer's belief must be objectively reasonable." *Cook v. State of R.I. Dept. of MHRH*, 10 F.3d 17 (1st Cir. 1993). In *Bento*, supra, the employer participated in the plaintiff's referral to two different doctors at two different times, neither of whom had provided an unqualified endorsement of the plaintiff's physical ability to do the work without danger to himself. Bento was a longshoreman, whose medical clearance specified that his pulse rate not rise above 120 beats per minute. The Court held, "Whether or not wrong as a matter of medical fact, the defendant's decision was a reasonable one, based on what, in the exercise of due diligence, it had learned." *Bento* at 745. In *Walker v. Attorney General*, 572 F.Supp. 100 (D.D.C. 1983), an FBI employee with angina was discharged after the FBI concluded that this medical condition would prevent him from performing his job. In *Walker*, contemporaneous medical information, available but not communicated to the FBI at the time the decision was made, indicated that Walker's condition was not as severe as Walker's own physician had represented. Nevertheless, the Court held,

> The only issue of law before the Court is whether the FBI owed plaintiff a duty to inquire further into his medical condition and to uncover the fact that the diagnosis of both plaintiff's cardiologist and the National Naval Medical Center was in error. . . . [T]he FBI was reasonable in concluding the plaintiff was not qualified for his position. Whatever duty the agency may have had to inquire into the

accuracy of plaintiff's doctor's diagnosis (and the Court makes no finding that such a duty necessarily exists), it was more than adequately complied with by referring the plaintiff to the National Naval Medical Center for an examination that confirmed that diagnosis. Defendant's decision to fire plaintiff was therefore justified, and cannot be challenged under the Rehabilitation Act. Of course, had the true nature of plaintiff's emotional problems been known by the FBI, it is possible that plaintiff could establish that he is an 'otherwise qualified' handicapped individual. But where the only facts before the employer establish without contradiction that the plaintiff is not 'otherwise qualified,' the employer cannot be accused of discrimination against an 'otherwise qualified' employee when it chooses to fire him.

Walker, supra at 102-3. On this basis, the Court granted summary judgment in favor of defendant.

Plaintiff seeks to distinguish this case from *Doe*, supra, and *Scoles v. Mercy Health Corp.*, 887 F. Supp. 765 (E.D. Pa. 1994), in which the court upheld termination of HIV-positive medical personnel on "direct threat" grounds despite later-discovered medical evidence contradicting such a threat. In those cases, the employers were not liable, because they had relied on "the most current medical knowledge." Plaintiff argues that this case is distinguishable from *Doe* and *Scoles*, supra, because the medical evidence contradicting that which was before Chevron did not represent a medical advance, but rather reflected current medical knowledge at the time Chevron made its decision. However, Chevron's non-liability, like that of the employers in *Walker* and *Bento*, supra, is not based upon its reliance upon the "most current medical knowledge," but rather upon its reliance on "the best available objective evidence."

Chevron's position is therefore straightforwardly analogous to that of the employers in *Bento* and *Walker*, supra. Like the

employer in *Bento*, Chevron received a qualified approval of the plaintiff's suitability for the position in question. The medical evidence presented to Chevron placed a restriction on Echazabal (no hepatotoxic substance exposure) just as the medical evidence before ITO suggested Bento not engage in activity which would elevate his heart rate. Like the medical information used by the FBI in *Walker*, the evidence before Chevron may in fact have been medically incorrect. In *Walker*, contemporaneous evidence suggested Walker's angina was not as severe as Walker's physician reported to the FBI. Nevertheless, despite the availability of this contemporaneous contradictory medical evidence, the FBI was held to have acted reasonably on the basis of the medical evidence which was before it.

In this case, Chevron relied upon Dr. McGill, whose opinion confirmed that of his predecessor, Dr. Baily. Chevron, through Dr. McGill, also made inquiries of Echazabal's physician, Dr. Weingarten, and sought the opinion of Chevron's Medical Director Dr. Bridge. This degree of diligence is equivalent to that of the FBI in *Walker*, in which, after the plaintiff's doctor's opinion was confirmed by the National Naval Medical Center, the FBI looked no further. The medical evidence controverting that upon which Chevron relied, which plaintiff has presented only after the fact, therefore does not raise a genuine issue of material fact as to whether Chevron behaved reasonably in relying upon the medical evidence before it.[9] Plaintiff's

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[9] In Opposition to Irwin's MSJ (although not to Chevron's MSJ), plaintiff has sought to distinguish this case from *Bento* and *Walker*, on the basis that the controverting medical evidence in those cases went to the issue of whether the plaintiff had a disability, not to whether an acknowledged disability posed a direct threat. (Pl.'s Opp. to Irwin's MSJ, 22:18-28, footnote 14.) However, when, as in *Bento*, *Walker* and this case, the direct threat in question is to the plaintiff himself, any evidence that the plaintiff is not actually disabled would,

contention that Chevron was under a further duty to gather additional information about specific concentration levels, alternative interpretations of enzyme functions tests, and so on, is unsupported by caselaw or other authority. (Pl.'s Opp. 21-22:2.)

To summarize, the issue is not whether Chevron was in fact objectively *correct* in its determination that Echazabal's continued employment at the refinery posed a direct threat to his health. Thus plaintiff's presentation of evidence that such employment did *not* present such a direct threat is not sufficient to raise a genuine issue of material fact in opposition to Chevron's Motion for Summary Judgment on these causes of action. As plaintiff has presented no admissible evidence raising a genuine issue of material fact as to whether Chevron was reasonable in its determination that the employment of Echazabal presented a direct threat to the plaintiff, summary judgment is GRANTED in favor of defendant Chevron on the FIRST, SECOND, and THIRD Causes of Action.

B. Chevron's Role in Irwin's Termination of Echazabal

Plaintiff's Sixth Cause of Action alleges that Chevron intentionally interfered with Echazabal's contractual relations with Irwin.

The elements of a cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a

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a fortiori, be evidence that employment in a particular position poses no direct threat to the plaintiff. If the caselaw does not require unassailable medical judgments as to actual disability, it cannot require them as to direct threat. Plaintiff has presented no caselaw or other authority in support of different requirements as to these two prongs of the analysis, and this Court is aware of none.

breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Savage v. Pacific Gas and Electric Co.*, 37 Cal. App. 4th 434, 448 (1993).

Defendant Chevron moves for summary judgment in its favor on the basis that Echazabal has presented no admissible evidence of the third element, Chevron's intent to induce a breach of the contract between Irwin and Echazabal. Such intent is an essential element of a claim for intentional interference under *Savage*, supra, and *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 766 (1984), overruled on other grounds.

Plaintiff has presented no admissible evidence in support of his contention that Chevron by its February 21, 1996 letter intended that the relation between Irwin and Echazabal be terminated. Although plaintiff has presented admissible evidence that Chevron intended (and indeed, required) that Echazabal no longer work in any position at the refinery in which he would be exposed to certain substances, this does not amount to an intention that Irwin terminate Echazabal; rather, Irwin might have reassigned him. Defendant Chevron has presented uncontroverted admissible evidence that Chevron intended only that Irwin place Echazabal in a position in which he would not be exposed to hepatotoxic substances. (Saner Decl. ¶10; Exh. 14 in support of Irwin's MSJ.) This does not amount to an intent to induce a breach or disruption of the contractual relationship between Echazabal and Irwin under *Savage* and *Seaman's*, supra. Evidence suggesting Chevron's prior lack of concern with Echazabal's exposure to such substances does not support an inference that Chevron intended that Irwin terminate Echazabal's employment altogether. Therefore, summary judgment is GRANTED in favor of Chevron on Echazabal's SIXTH Cause of Action, intentional interference with contractual relations.

C. Chevron's Motion for Summary Judgment as to Claims for Punitive Damages

As summary judgment has been granted in favor of Chevron on all causes of action against it, the issue of punitive damages as to Chevron is MOOT.

D. Irwin's Motion for Summary Judgment on the First and Second Causes of Action

Defendant Irwin seeks summary judgment in its favor on the First and Second Causes of Action against it, and also moves for summary judgment on plaintiff's claims for punitive damages.

The "direct threat" analysis engaged in by Chevron, set out above at IV.A supra, is also applicable to Irwin. It is undisputed that Irwin's decision, made by Kiesser, to remove Echazabal from the refinery was based on the letter from Chevron and Kiesser's communications with Dr. Tang. (Kiesser Depo. 115:14-20 and passim.) As required by *Rizzo*, supra, Irwin engaged in an "individualized assessment" of Echazabal, "based on a reasonable medical judgment that relies on . . . the best available objective evidence." *Rizzo*, supra at 763. The evaluation provided by Tang indicated that the danger to Echazabal was immediate, as required by *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1534 (9th Cir. 1995) (FEHA). Irwin gathered "all relevant information regarding the applicant's . . . medical history and independently assess[ed] both the probability and severity of potential harm," as required by *Mendez v. Gearan*, 956 F.Supp. 1520, 1527 (N.D. Cal. 1997) (Rehab. Act). Irwin, like Chevron, can be analogized to the employers in *Bento* and *Irwin*, who, while they may have reached medically incorrect judgments, behaved in an objectively reasonable, and therefore lawful, manner. Irwin did not simply rely upon Chevron's letter; it sought further objective evidence from Dr. Tang, which confirmed the opinion

of Chevron's doctor. As in *Walker*, the employer was under no duty to inquire still further.

Irwin also argues that Echazabal's causes of action fail because Echazabal is not disabled. However, the ADA and FEHA protect not only actually disabled persons, but also those "regarded as" disabled by their employers. 42 U.S.C. § 12102(2) (ADA); Cal. Gov. Code § 12926(k) (FEHA); see also 29 C.F.R. § 1630.2(1) (EEOC ADA Regs.); 2 Cal. Code of Regs. § 7293.6(e)(2)(A)-(D) (FEHA Regs.). Where a plaintiff's condition is treated by his employer as posing a direct threat, such a plaintiff has almost by definition been "regarded as" disabled by that employer. *Roe v. District of Columbia*, 842 F.Supp. 563, 568 (D.D.C. 1993). Such is the situation in this case.

However, in Opposition to Irwin's Motion for Summary Judgment, plaintiff has also argued the issue of "reasonable accommodation" by Irwin. An employer violates the ADA in excluding an otherwise qualified disabled person from employment, even if he poses a direct threat to himself, if the threat can "be eliminated by reasonable accommodation," *Doe*, supra, at 1264-65. FEHA similarly requires that the direct threat not be able to be eliminated by "reasonable accommodations." Cal. Gov. Code § 12940(a)(1); *see also* Cal. Gov. Code § 12940(d). Under both the ADA and FEHA, an employer has an affirmative obligation to make reasonable accommodation to an individual's disability, so long as such accommodation does not constitute an undue burden. *School Board of Nassau County v. Arline*, 480 U.S. 273, 289, fn. 19 (1987); *Prilliman v. United Airlines*, 53 Cal. App. 4th 935 (1997). Reasonable accommodations include job restructuring and reassignment. 2 C.C.R. § 7293.9(o); 29 C.F.R. § 1630.29(o).

In this case, plaintiff has presented admissible evidence raising genuine issues of material fact as to whether Irwin could have made reasonable accommodation to plaintiff's disability

(whether real or perceived), for example, by placing him in positions for which he was qualified and which would not have involved exposure to hepatotoxic hydrocarbons. Plaintiff has presented admissible evidence that plaintiff was qualified for such positions, that such positions existed and were filled by Irwin during the relevant times, that plaintiff made himself available for such positions, and that Irwin nevertheless did not assign him to such positions. Because genuine issues of material fact remain as to whether reasonable accommodations by Irwin might have rendered plaintiff "otherwise qualified" for employment by Irwin, summary judgment on the First and Second Causes of Action as to defendant Irwin should be DENIED.

E. Irwin's Motion for Summary Judgment as to Claims for Punitive Damages

The availability of punitive damages is a question of state law. *Central Office Tel. v. AT&T Co.*, 108 F.3d 981, 993 (9th Cir. 1997). In order to recover punitive damages under California law, a party must prove the defendant was guilty of malice or oppression (or fraud, not at issue in this case), defined by Cal. Civ. Code § 3294(a) in pertinent part as follows:

> (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

In Opposition to Irwin's motion for summary judgment as to claims for punitive damages, plaintiff argues in effect that malice may be inferred from any facts supporting violation of the ADA (and, by implication, FEHA as well). (Pl.'s Opp. 33:18-34:16.) This position is not supported by law.

> 'Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage.' . . . [A] conscious disregard [rather than reckless disregard or misconduct] . . . may constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant . . . wilfully and deliberately failed to avoid (harmful consequences to the plaintiff).

Taylor v. Superior Court, 24 Cal. 3d 890, 894-5 (1979).

In this case, although plaintiff has presented admissible evidence raising genuine issues of material fact sufficient to oppose Irwin's motion for summary judgment on Echazabal's claims that his rights under the ADA and FEHA were violated, plaintiff has filed to present that "something more," admissible evidence raising a genuine issue of material fact as to Irwin's conscious disregard of Echazabal's rights. Irwin's motion for summary judgment as to punitive damages should therefore be GRANTED.

V. CONCLUSION

Defendant Chevron's Motion for Summary Judgment is GRANTED.

Defendant Irwin's Motion for Summary Judgment is DENIED as to the First and Second Causes of Action, but GRANTED as to the issue of punitive damages.

IT IS SO ORDERED.

Dated: January 5, 1997

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted in printing]

Appeal from the United States District Court for the Central District of California; Lourdes G. Baird, District Judge, Presiding. No. CV-97-03498-LGB.

Argued and Submitted Nov. 3, 1999.
Submission Vacated Nov. 15, 1999.
Resubmitted Jan. 25, 2000.
Filed May 23, 2000.
Amended Sept. 26, 2000.

Before: BRIGHT,* REINHARDT, and TROTT, Circuit Judges.

Opinion by Judge REINHARDT; Dissent by Judge TROTT.

ORDER

The Opinion filed on May 23, 2000 is amended to include the attached dissent by Judge Trott.

OPINION

REINHARDT, Circuit Judge:

On this appeal, the principal question we consider is whether the "direct threat" defense available to employers under the

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Americans with Disabilities Act applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace. We conclude that it does not.

I.

Mario Echazabal first began working at Chevron's oil refinery in El Segundo, California in 1972. Employed by various maintenance contractors, he worked at the refinery, primarily in the coker unit, nearly continuously until 1996, when the events that gave rise to this litigation occurred.

In 1992, Echazabal applied to work directly for Chevron at the same coker unit location. After determining that he was qualified for the job, Chevron extended him an offer contingent on his passing a physical examination. A preemployment physical examination conducted by Chevron's regional physician revealed that Echazabal's liver was releasing certain enzymes at a higher than normal level. Based on these results, Chevron concluded that Echazabal's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. For that reason, Chevron rescinded its job offer. Nevertheless, Echazabal continued to work for Irwin, a maintenance contractor, throughout the refinery—including at the coker unit. Chevron made no effort to have him removed from his assignment.

After learning of the enzyme test results, Echazabal consulted with several doctors and eventually was diagnosed with asymptomatic, chronic active hepatitis C. Throughout his treatment, Echazabal told each physician who treated him about the type of work that he did. In addition, at least one of his physicians was provided with a document that detailed the specific environmental hazards present in the vicinity of the coker unit at the refinery. None of these physicians advised Echazabal that he should stop working at the refinery because of his medical condition.

In 1995, Echazabal again applied to Chevron for a position at the coker unit. As it had done before, Chevron made Echazabal a job offer that was contingent upon his passing a physical examination. Once again, Chevron eventually rescinded its job offer on the ground that there was a risk that Echazabal's liver would be damaged if he worked at the coker unit. Unlike in 1992, however, Chevron did not simply allow Echazabal to continue working for Irwin at the refinery. Instead, Chevron wrote Irwin and asked that it "immediately remove Mr. Echazabal from [the] refinery or place him in a position that eliminates his exposure to solvents/chemicals." As a result, Echazabal was no longer permitted to work at the Chevron refinery.

Immediately after losing his position at the refinery, Echazabal filed a complaint with the Equal Employment Opportunity Commission. He subsequently filed a complaint in state court that alleged, among other things, that both Chevron and the maintenance contractor had discriminated against him on the basis of a disability, in violation of the Americans with Disabilities Act (ADA). After Chevron removed the action to federal court, the district court granted Chevron's motion for summary judgment on all of Echazabal's claims. The court then stayed the proceedings between Echazabal and the maintenance contractor (it had denied the contractor's summary judgment motion) and certified for appeal its grant of summary judgment in favor of Chevron.[1]

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[1] The district court also certified for appeal three other claims by Echazabal on which it granted summary judgment for Chevron: a Rehabilitation Act claim, a claim under California's Fair Employment and Housing Act, and a claim that Chevron intentionally interfered with Echazabal's employment contract with the contractor for whom he worked. As we discuss below, *see infra* note 13, in this opinion we vacate the district court's grant of summary judgment as to the first two of these claims. In a separate memorandum disposition filed concurrently herewith, we also reverse the district court's grant of summary judgment with respect to the intentional interference with contract claim.

II.

On appeal, Chevron argues that it may defend its decision not to hire Echazabal on the ground that it reasonably concluded that Echazabal would pose a direct threat to his own health if he worked at the refinery. It acknowledges that, with respect to "otherwise qualified" individuals, the ADA prohibits employers from "using qualification standards . . . that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities." 42 U.S.C. § 12112(b)(6) (1994); *see also* 42 U.S.C. § 12113(a). Chevron contends, however, that its refusal to hire Echazabal falls under an affirmative defense that the ADA provides to this charge of discrimination. In the "defenses" section of the Act, the statute provides that an employer may impose, as a "qualification standard," "a requirement that an individual shall not pose a direct threat to the health or safety of *other individuals* in the workplace." 42 U.S.C. § 12113 (emphasis added).[2]

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[2] The defenses section of Title I of the ADA reads in relevant part:

> (a) In general
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
> (b) Qualification standards
> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.
> . . . .

42 U.S.C. § 12113. The subsection that sets forth the "direct threat" language does not explicitly set forth an affirmative defense to a

The question before us is whether the "direct threat" defense includes threats to one's own health or safety. That is, we must decide whether the provision permits employers to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety. As we noted recently in *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999), "[w]e have not yet ruled on whether the direct threat defense includes threats to one's self."[3] *Id.* at 1247 n.1. In addition to being a question of first impression in this Circuit, the issue has received almost no treatment in other Circuits. While several cases do state, in passing dicta, that the direct threat defense includes threats to oneself, *see LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998); *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Daugherty* v. *City of El Paso*, 56 F.3d 695 (5th Cir. 1995), only the Eleventh Circuit appears to have held that the defense encompasses such threats. *See Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996). The *Moses* court provides us with no guidance, however, because it gives no explanation for its holding. Instead, it simply asserts, without analysis, that the ADA's direct threat defense applies to threats to the disabled individual himself.[4]

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claim of disability discrimination. Nevertheless, it is clear that Congress intended the provision to define the terms of such defense.

[3] We asked the parties and the amicus EEOC to be prepared to discuss, at oral argument, whether the direct threat defense includes threats to oneself. Following argument, we invited the parties and the EEOC to submit briefs on the question. While the parties submitted such briefs, the EEOC advised us that it did not wish to do so.

[4] A district court in the Seventh Circuit has examined the question in detail. It concluded, as do we, that the direct threat defense does not apply to threats to oneself. *See Kohnke* v. *Delta Airlines, Inc.*, 932 F. Supp. 1110 (N.D. Ill. 1996).

In order to resolve the scope of the direct threat defense, we turn first to the language of provision itself. Here, that language is dispositive. The direct threat defense permits employers to impose a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to "other individuals in the workplace," the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense.[5] *Expressio unius est exclusio alterius*. Finally, the obvious reading of the direct threat defense as not including threats to oneself is supported by the definitional section of Title I, which states that "[t]he term 'direct threat' *means* a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3) (emphasis added). The fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself. *Cf. United States Trustee* v. *Garvey, Schubert & Barer* (*In re Century Cleaning Servs., Inc.*), 195 F.3d 1053, 1057-58 (9th Cir. 1999). For these reasons, we conclude that the language of the direct

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[5] It is true that, in the Eleventh Amendment context, the Supreme Court has rejected a similar textual argument. Although the Eleventh Amendment specifies only that "citizens of *another* state" may not sue a state, the Court has held that states are immune from suit by citizens of the *same* state. *See Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 54 (1996); *Hans* v. *Louisiana*, 134 U.S. 1 (1890). *But see Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989); U.S. Const. amend. XI. Regardless of the merits of the Court's interpretation of the Eleventh Amendment, we decline to follow a similar approach here or to adopt so atextual a reading of the direct threat defense. Rather, we prefer to afford the statute its plain meaning.

threat defense plainly does not include threats to the disabled individual himself.

Although we need not rely on it, the legislative history of the ADA also supports the conclusion that the direct threat provision does not include threats to oneself. The term "direct threat" is used hundreds of times throughout the ADA's legislative history—in the final conference report, the various committee reports and hearings, and the floor debate. *See, e.g.*, H.R. Conf. Rep. No. 101-596, at 57, 60, 77, 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 566, 569, 586, 593. In nearly every instance in which the term appears, it is accompanied by a reference to the threat to "others" or to "other individuals in the workplace." Not once is the term accompanied by a reference to threats to the disabled person himself. In addition, both the Report of the House Judiciary in the Report of the Committee on Education and Labor explain that the direct threat provision is intended to codify the Supreme Court's holding in *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273 (1987)—a case that defines "[t]he term 'direct threat' [to] mean[ ] a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation." H.R. Rep. No. 101-485, pt. 3, at 34, 45-46 (1990) (emphasis added) (*citing Arline*), *reprinted in* 1990 U.S.C.C.A.N. 445, 457; *see also* H.R. Rep. No. 101-485, pt. 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. 303, 359. While the House Judiciary Report notes that the ADA extends the *Arline* standard "to all individuals with disabilities, and not simply to those with contagious diseases or infections," H.R. Rep. No. 101-485, pt. 3, at 45, *reprinted in* 1990 U.S.C.C.A.N. 445, at 468, it says nothing about extending the standard to cover a disabled person whose employment would be harmful to himself as opposed to other individuals. Finally, the following statement made by Senator Kennedy, a co-sponsor of the ADA, also strongly bolsters our reading of the statute:

> The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace – that is, to other coworkers or customers. . . . It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply "protecting the individual" from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

136 Cong. Rec. S9684-03, at S9697 (1990).[6] In short, the legislative history convincingly supports the unambiguous wording of the direct threat defense.

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[6] We found but one discussion in the legislative history that could be read as contrary to the plain reading of the direct threat defense. The report of the House Committee on Education and Labor contains the following somewhat ambiguous passage:

> A candidate, undergoing a post-offer, pre-employment medical examination may not be excluded, for example, solely on the basis of an abnormality on an x-ray. However, if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate . . .

H.R. Rep. No. 101-485, pt. 2, at 73-74, *reprinted in* 1990 U.S.C.C.A.N. 303, 355-56. The quoted language does not make it clear to whom such "substantial harm" might occur. In any event, this general discussion does not take place in the context of discussing the direct threat defense. When the House Committee report does discuss the direct threat defense specifically, it, like the other reports, states that the defense codifies the standard set forth by the Supreme Court in *Arline*. In the end, the evidence provided by this isolated passage is vastly outweighed by the substantial evidence to the contrary that appears throughout the legislative history.

Congress's decision not to include threats to one's own health or safety in the direct threat defense makes good sense in light of the principles that underlie the ADA in particular and federal employment discrimination law in general. As Senator Kennedy noted in the statement quoted above, the ADA was designed in part to prohibit discrimination against individuals with disabilities that takes the form of paternalism. This goal is codified in the Act itself: in the "Findings" section of the ADA, Congress concluded that "overprotective rules and policies" are one form of discrimination confronting individuals with disabilities. 42 U.S.C. § 12101(a)(5); *see also* H.R. Rep. No. 101-485, pt. 2, at 74, *reprinted in* 1990 U.S.C.C.A.N. 303, 356 (noting that "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities").

More generally, courts have interpreted federal employment discrimination statutes to prohibit paternalistic employment policies. The Supreme Court's interpretation of Title VII in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), and *International Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), provides a good example of this principle. In *Dothard*, the Court stated that "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." 433 U.S. at 335. While the Court permitted the employer in that case to hire only male guards in contact areas of maximum security male penitentiaries, it did so only because more was at stake than the "individual woman's decision to weigh and accept the risks of employment." *Id.* Sex was a bona fide occupational qualification, the Court concluded, because the employment of a female guard would, due to the guard's sex, create a real threat to the safety to *others* if violence broke out. *See id.* at 336. In *Johnson Controls*, the Court reiterated "that danger to a woman herself does not justify discrimination." 499 U.S. at 202 (*citing Dothard*). The court there held that the threats of

lead exposure to female employees' own reproductive health did not justify the employer's decision to exclude women from certain positions at a battery manufacturing plant. *See id.* at 206-07. Given Congress's decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health and safety at risk, it should come as no surprise that it would enact legislation allowing the same freedom of choice to disabled individuals.

Chevron makes two arguments as to why the direct threat provision should not be given its plain meaning. First, Chevron argues that we should defer to the EEOC's contrary interpretation of the ADA. The implementing regulations of Title I of the ADA promulgated by the EEOC do, as Chevron contends, state that an employer may assert a "direct threat" defense with respect to individuals who pose a threat only to their own health or safety.[7] *See* 29 C.F.R. § 1630.15(b)(2) (1999) ("The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace." (emphasis added)); 29 C.F.R. § 1630.2(r). Our determination whether a particular regulatory provision is valid begins with an inquiry into whether we must defer to the agency's construction, and if so, what level of deference the agency interpretation is owed. In the present case, we need not determine what level of deference Title I regulations are due, because we would reject the EEOC's regulatory interpretation of the statutory "direct threat" provision even were we to conclude that *Chevron* deference is appropriate.[8] Under

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[7] While we invited the EEOC, as amicus, to file a brief commenting on the validity of its regulatory interpretation, it declined to do so. *See supra* note 3.

[8] While we need not decide what level of deference the regulations implementing Title I are due, we note that Congress explicitly required the EEOC to issue regulations implementing Title I. *See* 42

Chevron, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999). As we concluded above, the intent of Congress is clear: the language of the direct threat defense plainly expresses Congress's intent

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U.S.C. § 12116 ("Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter [Title I] . . . ."). *Chevron* sets forth the level of deference that "should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. In fact, with respect to Title II of the ADA, we have held that *Chevron* governs review of regulations promulgated by the Attorney General because "Congress required the Attorney General to promulgate regulations implementing Title II." *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1172-73 (9th Cir. 1999); *see also Dare* v. *California*, 191 F.3d 1167, 1172 (9th Cir. 1999); *Does 1-5* v. *Chandler*, 83 F.3d 1150, 1153 (9th Cir. 1996).

The regulations implementing Title I of the ADA present a different deference question than that confronted by the Supreme Court in its recent ADA decisions. In *Sutton* and *Kirkingburg*, the Supreme Court reserved the question whether, and to what extent, the regulations and interpretive guidance "promulgated by the EEOC relating to the ADA's definitional section, 42 U.S.C. § 12102," are entitled to deference. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162, 2167 n.10 (1999); *see also Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 2151 (1999); *Broussard* v. *University of Cal. at Berkeley*, 192 F.3d 1252, 1256 n.2 (9th Cir. 1999) (reserving same question). As the Supreme Court specifically noted, however, "[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA, *see* §§ 12101-12102, which fall outside Titles I-V." *Sutton*, 119 S. Ct. at 2145. Unlike the generally applicable provisions considered in *Kirkingburg* and *Sutton*, Title I contains an explicit grant of regulatory authority to the EEOC.

to include within the scope of a § 12113 defense only threats to other individuals in the workplace. Accordingly, we reject the EEOC's contrary interpretation.

Second, Chevron suggests that we must ignore Congress's clear intent because forcing employers to hire individuals who pose a risk to their own health or safety would expose employers to tort liability. Because Chevron has not argued that it faces any costs from tort liability, this question is not properly before us. *See Johnson Controls*, 499 U.S. at 210. Nevertheless, we should note that, in *Johnson Controls*, the Supreme Court strongly suggested that state tort law would be preempted to the extent that it interfered with federal antidiscrimination law. The Court stated that "we have not hesitated to abrogate state law where satisfied that its enforcement would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Johnson Controls*, 499 U.S. at 209-10 (internal quotation marks omitted). Therefore, given that the ADA prohibits employers from refusing to hire individuals solely on the ground that their health or safety may be threatened by the job, state tort law would likely be preempted if it interfered with this requirement. Moreover, we note that Chevron's concern over an award of damages reflects a fear that hiring a disabled individual will cost more than hiring an individual without any disabilities. The extra cost of employing disabled individuals does not in itself provide an affirmative defense to a discriminatory refusal to hire those individuals. *See, e.g.*, 42 U.S.C. § 12112(b)(5)(A) (requiring employers to accommodate disabled individuals, even when those accommodations impose additional costs, unless the employer can demonstrate that the accommodations "would impose an undue hardship on the operation of the business").

In short, the plain language of the direct threat provision is dispositive: Section 12113 does not afford a defense on the basis that the performance of a job would pose a direct threat to

an employee's (or prospective employee's) own health or safety. *See* 42 U.S.C. § 12113.

III.

Chevron next contends that, even if the direct threat provision does not provide it with a defense to its actions, it may defend its decision not to hire Echazabal on the ground that, because of the risk of damage to his liver, he is not "otherwise qualified" to perform the job at issue. Put simply, Chevron's argument is that the § 12113 "direct threat" defense does not set forth the exclusive way in which it may defend its decision not to hire Echazabal because of the risk to his health.

We agree, of course, that the ADA does not require employers to hire individuals who are not "otherwise qualified." Only a person who is a "qualified individual with a disability" is protected from discrimination under the ADA. *See* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . ."). According to the Act, the term "qualified individual with a disability" means:

> [A]n individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8) (emphasis added).

We do not agree, however, with Chevron's assertion on appeal that performing the work at the coker unit *without posing a threat to one's own health or safety* is an "essential

function" of the coker unit job. Chevron argues that it is an essential function because "the record establishes that Chevron did prepare a written description of the job before advertising it and it incorporated the need for an employee to be able to tolerate an environment including, among other things, hydrocarbon liquids and vapors, petroleum, solvents and oils." According to Chevron, the "requirement" of the job description that an employee not be susceptible to harm from the chemicals is an "essential function" of the job simply because Chevron has chosen to describe it as such.

While we give consideration to an employer's judgment as to what functions of a job are essential, *see* 42 U.S.C. § 12111(8), an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description. Job functions are those acts or actions that constitute a part of the performance of the job. "The job" at the coker unit is to extract usable petroleum products from the crude oil that remains after other refining processes. The job functions of the "plant helper" position for which Echazabal applied consist of various actions that help keep the coker unit running. Chevron does nothing more than add a prohibited condition to these actual job functions when it asserts that the job functions at the coker unit consist of performing the actions that help keep the unit running *without posing a risk to oneself.* Were we to ignore the limits of the actual functions of the job at issue and permit Chevron to add to those functions any condition it chooses to impose in its written job description, the term "essential function" would be rendered meaningless.[9]

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[9] Chevron's argument is markedly similar to the argument made by the dissent in *Johnson Controls* regarding the word "occupation" in the term "bona fide occupational qualification," as used in Title VII of the Civil Rights Act. *See Johnson Controls*, 499 U.S. at 211 n.1 (White, J., concurring); *id.* at 201. In *Johnson Controls*, the majority rejected the dissent's interpretation, *see id.* at 201, 203-04, and

Moreover, Chevron's reading of "essential functions" would, by definitional slight-of-hand, circumvent Congress's decision to exclude a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work. Accordingly, we reject Chevron's interpretation of what may constitute an "essential function" of a job.[10]

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described the fallacy of the argument as follows: "It is word play to say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western airlines is to fly planes without crashing." *Johnson Controls*, 499 U.S. at 207 (quoting *Johnson Controls*, 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)).

[10] Chevron argues that, in spite of the fact that it would undermine the clear language of the ADA's direct threat provision, we should conclude that a personal safety requirement is a valid qualification standard because such a conclusion is supported by case law implementing the Rehabilitation Act. It is true that at least one Ninth Circuit Rehabilitation Act case appears to conclude that a disabled individual is not a "qualified handicapped person" if her employment would pose "a reasonable probability of substantial harm" to her. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422-24 (9th Cir. 1985) (stating that a risk to self may prevent an individual from being "qualified," but holding that the district court applied a standard too lenient when it found that, because the individual's employment would pose "an elevated risk of injury," she was not a qualified handicapped person). *But cf. Bentivegna* v. *United States Dep't of Labor*, 694 F.2d 619, 622-23 & n.3 (9th Cir. 1982) (questioning, under the Rehabilitation Act, whether a risk of future injury to self would be "related to the performance of the job and . . . consistent with business necessity," but declining to "hold that a non-imminent risk of injury cannot justify rejecting a handicapped individual").

Mantolete does not affect our analysis, however, because it relies on a Rehabilitation Act regulation that is irrelevant to our inquiry. The *Mantolete* court relied on a Rehabilitation Act regulation that defined a "qualified handicapped person" as an individual who, among other things, is able to "perform the essential functions of the

Given that not posing a risk to one's own health or safety cannot in itself constitute an essential job function, it is clear that Chevron's reason for refusing to hire Echazabal is not related to Echazabal's ability to perform the essential functions of the job for which he applied.[11] Chevron has never contended that the risk Echazabal allegedly poses to his own health renders him unable to perform those duties. Nor would we accept such an argument in this case were Chevron to make it. Echazabal worked for Irwin at the coker unit, performing work similar to the job for which he applied, long after he was diagnosed with hepatitis. There is no evidence that the health of his liver ever affected his ability to do the job. Had Echazabal

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position in question without endangering the health and safety of *the individual* or others." 29 C.F.R. § 1613.702(f) (emphasis added); *see also Mantolete*, 767 F.2d at 1421. The Rehabilitation Act did not provide a statutory definition of the term "qualified handicapped person." Thus, the court deemed the regulations controlling. In contrast to the Rehabilitation Act, the ADA contains a statutory definition of the term "qualified individual with a disability," which is the ADA's equivalent of the Rehabilitation Act's "qualified handicapped person." *See* 42 U.S.C. § 12111(8). The statutory definition in the ADA does not mention threats to the health or safety of the individual or others. Rather, it requires only that the individual be able, with or without reasonable accommodation, to "perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Obviously, the ADA's statutory definition of the term "qualified individual with a disability" supercedes the Rehabilitation Act's regulatory definition of the analogous term.

[11] In the context of threats to *others*, as opposed to threats to self, a few circuits have addressed employer claims that a threat that an individual posed to others prevented that person from performing the essential functions of the job at issue. *See EEOC* v. *Amego, Inc.*, 110 F.3d 135, 142-44 (1st Cir. 1997); *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873-75 (5th Cir. 2000). Because these decisions deal with threats to others, they are irrelevant to our analysis.

failed during that period to perform the essential functions of his work, we seriously doubt that Chevron would have twice extended him contingent offers to work at the coker unit.

Accordingly, we hold that the risk that Echazabal's employment might pose to his own health does not affect the question whether he is a "qualified individual with a disability."

IV.

For the foregoing reasons, we conclude that the ADA's direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk. Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake. The district court's grant of summary judgment to Chevron on Echazabal's ADA claim is reversed.[12]

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[12] As noted above, the district court also certified for appeal its grant of summary judgment in favor of Chevron on the Rehabilitation Act and FEHA claims. In granting Chevron summary judgment with respect to those claims, however, the district court treated the substantive standards for liability under all three statutes as identical. We note that this conclusion may well be correct with respect to the Rehabilitation Act. In 1992, Congress amended the relevant provision of the Rehabilitation Act—section 504—by adding the following subsection:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201-12204 and 12210), as such sections relate to employment.

Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 506, 106 Stat. 4344, 4428 (amendments codified at 29 U.S.C. § 794(d)). Thus, our reversal as to the ADA claim may well require reversal with respect to the Rehabilitation Act claim. Nevertheless, we leave it to the district court to determine initially whether summary judgment should be granted to Chevron as to the Rehabilitation Act and FEHA claims. Accordingly, we vacate the district court's grant of summary judgment with respect to those claims, and remand for reconsideration in light of our decision. In addition, because we reverse the district court's grant of summary judgment as to the ADA claim and vacate its grant of summary judgment as to the Rehabilitation Act and FEHA claims, we also reverse the district court's judgment that Echazabal's claim for punitive damages is moot.

REVERSED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion.

TROTT, Circuit Judge, dissenting:

Mario Echazabal sues over not getting a job handling liver-toxic substances, *i.e.*, "hydrocarbon liquids and vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, and chlorine bleach." He was denied the job because he suffers from a chronic, uncorrectable, and life-threatening viral liver disease—Hepatitis C—that most likely will be aggravated by exposure to these hazardous materials to the extent that his life will be endangered.

Chevron first discovered Mr. Echazabal's condition in 1992 when he was examined by Dr. Philip Bailey. Dr. Bailey studied toxicology at the University of Texas and is Board Certified in preventative occupational medicine. Dr. Bailey concluded on the basis of an examination of Mr. Echazabal and lab tests that his liver function was "grossly abnormal" and that he should not be exposed to liver-toxic chemicals or alcohol. Dr. Bailey's findings and conclusions were recorded in Chevron's records.

Some years later, on December 28, 1995, Chevron offered Mr. Echazabal a job in its El Segundo refinery, but the offer was contingent on the results of a standard pre-employment physical examination. Enter Dr. Kenneth McGill, Dr. Bailey's successor. As had Dr. Bailey, Dr. McGill worked at the refinery clinic and was familiar with the conditions and demands of the work at issue. On the basis of a thorough medical examination and a review of blood tests, Dr. McGill determined that the chemicals and solvents to which Mr. Echazabal would be exposed at the refinery would further damage his reduced liver capacity and seriously endanger his health and his life. About this concern, Dr. McGill consulted by telephone with Mr. Echazabal's personal treating physician, Dr. Zelman Weingarten. Dr. Weingarten reported to Dr. McGill that extended Interferon therapy had not cleared his patient's condition, and that exposure to hepatotoxic hydrocarbons was not recommended. Then, Dr. McGill discussed his findings and conclusions with Dr. T.L. Bridge, Chevron's Medical Director in San Francisco. Dr. Bridge agreed with Dr. McGill's and Dr. Bailey's assessments that Mr. Echazabal could not safely work as a plant helper in the coker unit at the refinery. Not a single doctor disagreed with this conclusion. Mr. Echazabal did not offer any evidence or information to the contrary. Accordingly, and because Mr. Echazabal did not pass the required physical examination for the job, the offer of employment was withdrawn.

Dr. Brian Tang, a separate medical specialist in occupational medicine subsequently hired by his immediate employer Irwin Industries, also came to the conclusion that Mr. Echazabal has a condition that will be "worsened by . . . exposure [to hepatotoxins], causing probable death." Eight laboratory tests support the doctors' reasonable medical judgment and Chevron's objective, individualized, and sensible decision not to give Mr. Echazabal the job. He now brings to court facially competing information, but this information was not in Chevron's hands when they made the decision he now claims

is actionable. In fact, the information did not surface until this lawsuit, rendering it suspect at best. As we held in *Cook v. United States Dept. of Labor*, 688 F.2d 669 (9th Cir. 1982), medical evidence that surfaces after the decision has been made is of no moment in this context regarding the bona fides of the decision itself. What is at issue here is the manner in which Chevron made its decision, not whether lawyers could later find another doctor to say something else.

I agree with the district court that Mr. Echazabal has no case, and I do so for two primary reasons. First, Mr. Echazabal simply is not "otherwise qualified" for the work he seeks. Why? Because the job most probably will endanger his life. I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him. To ignore this reality is bizarre. The EEOC's relevant regulation provides that "the term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. § 1630.15(b)(2).

Our law books, both state and federal, overflow with statutes and rules designed by representative governments to protect workers from harm. Long ago we rejected the idea that workers toil at their own peril in the workplace. "Paternalism" here is just an abstract out-of-place label of no analytical help. Whether paternalism or maternalism, the concept is pernicious when it is allowed to dislodge longstanding laws mandating workplace safety. That battle was fought and lost long ago in our legislatures. In many jurisdictions, it is a crime knowingly to subject workers to life-endangering conditions. California Labor Code § 6402 expressly forbids an employer from putting an employee in harm's way. In Arizona, an employer who fails to provide a safe workplace commits a felony. Ariz. Rev. Stats. Annot., Labor § 24-403, § 23-418. In effect, we repeal these laws with respect to this appellant, and to other workers in similar situations. So much for OSHA. Now, our laws give *less*

protection to workers known to be in danger than they afford to those who are not. That seems upside down and backwards. Precisely the workers who need protection can sue because they receive what they need.

Second, Chevron has a defense to this action, known as the "direct threat" defense. 42 U.S.C. § 12113(b). The EEOC's implementing regulations, authorized by Congress, defines a "direct threat" to mean "a significant risk of substantial harm to the health or safety of *the individual* or others that cannot be reduced by reasonable accommodation. . . . " 29 C.F.R. § 1630.2(r) (Emphasis added). The EEOC's own *Technical Assistance Manual* on the employment provisions of the ADA states: "The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual who would pose a 'direct threat' to health or safety." EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* § 4.4 (1992).

On these issues, the EEOC has rationally and humanely spoken. Under *Chevron U.S.A.* v. *Natural Resources Defense*, 467 U.S. 837, 844-45 (1984), we owe deference to the EEOC's interpretation of the Act, but we have failed to acknowledge this responsibility. Contrary to what some might believe, we do not know more about this subject than the EEOC. Following the EEOC's guidance, Mr. Echazabal is not qualified for this work.

Chevron correctly points out that the majority's holding leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper. The possible examples of this Pickwickian ruling are endless. I doubt that Congress intended such a result when it enacted laws to protect persons with disabilities.

The ADA provides a defense to employers who can demonstrate that an accommodation constitutes an "undue hardship." 42 U.S.C. § 12112(b)(5)(A). I believe it would be an undue hardship to require an employer to place an employee in a life-threatening situation. Such a rule would require employers knowingly to endanger workers. The legal peril involved is obvious, and a simple human to human matter, such a moral burden is unconscionable.

The idea that conflicting responsibilities under different labor laws will be solved down the long, expensive, and unpredictable litigation road by the doctrine of implied preemption seems highly pernicious in this context, and a thin reed at best. Did Congress really intend to nullify state and federal workplace safety laws and render them impotent to protect workers in identifiable harm's way? I doubt it. Does anti-paternalism trump basic safety concerns? This entire construct makes a house of cards look secure.

Finally, and fortunately, we have created a conflict with the Eleventh Circuit, which held that "an employer may fire a disabled employee if the disability renders the employee a 'direct threat to his own health or safety.'" *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997). I say "fortunately" because this conflict will compel the Supreme Court—or Congress—to resolve this dispute—unless we do so ourselves by way of en banc review.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted in printing]

Appeal from the United States District Court for the Central District of California; Lourdes G. Baird, District Judge, Presiding. No. CV-97-03498-LGB.

Argued and Submitted Nov. 3, 1999—Pasadena, California.
Submission Vacated Nov. 15, 1999.
Resubmitted Jan. 25, 2000.
Decided May 23, 2000.

Before BRIGHT,[1] REINHARDT, and TROTT, Circuit Judges.

MEMORANDUM[2]

In an opinion filed concurrently with this memorandum disposition, we reverse the district court's grant of summary judgment on Echazabal's claim under the Americans with Disabilities Act and remand for further proceedings. This memorandum disposition addresses Echazabal's appeal of the district court's grant of summary judgment on one of his state law claims—that Chevron is liable for intentionally interfering with his employment contract with Irwin. The district court

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[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

granted Chevron's summary judgment motion on the ground that Echazabal "presented no admissible evidence in support of his contention that Chevron by its February 21, 1996 letter intended that the relation between Irwin and Echazabal be terminated."

In *Seaman's* v. *Standard Oil*, 686 P.2d 1158 (Cal. 1984) (in bank), the California Supreme Court held that intent to interfere with a contract "may be established by inference as well as by direct proof. Thus [the jury may] infer culpable intent from conduct 'substantially certain' to interfere with the contract." *Id.* at 767; *see also Ramona Manor Convalescent Hosp.* v. *Care Enters.*, 225 Cal. Rptr. 120, 124-26 (Ct. App. 1986) (finding that the jury's determination of intent supported by the evidence, and focusing on the existence of knowledge of the third-party contract). While the California Supreme Court later overruled *Seaman's* to the extent that *Seaman's* suggested that its holding applied to actions for tortious interference with *prospective* economic relations as well as to actions for tortious interference with *existing* contractual relations, it did not upset *Seaman's* holding with respect to existing contractual relations. *See Penna* v. *Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740 (Cal. 1995). In fact, the *Penna* court reinforced *Seaman's* holding with respect to existing contracts by "draw[ing] and enforc[ing] a sharpened distinction between claims for the tortious disruption of an existing contract and claims [for tortious interference with a] prospective contractual or economic relationship." *Id.* at 750. For the latter claims, the court held, the plaintiff cannot succeed in demonstrating intentional interference with prospective economic relations by introducing only evidence "that the defendant . . . *knowingly* interfered with the plaintiff's expectancy." *Id.* at 751. By adopting a stricter test for cases involving prospective economic relationships, the *Penna* court reinforced the *Seaman* conclusion that, with respect to an existing contract, a jury may infer an intent to interfere from the defendant's knowledge of

the third-party contract accompanied by conduct "substantially certain" to interfere.

Summary judgment was inappropriate here because there is no dispute that Chevron had knowledge of Echazabal's employment contract with Irwin, and a genuine issue of material fact exists as to whether Chevron engaged in conduct "substantially certain" to interfere with that contract. First, Chevron obviously knew of Echazabal's employment contract with Irwin—had it not, it would have had no occasion to send a letter to Irwin requiring that it remove Echazabal from the refinery or move him to a position in which he would not be exposed to solvents and chemicals.

Second, a fact-finder could conclude, by drawing permissible inferences, that Chevron's actions were "substantially certain to interfere" with Echazabal's employment contract with Irwin. "Interference" includes inducing a disruption of the contractual relationship. *See Savage* v. *Pacific Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 314 (Ct. App. 1993). It also includes making the plaintiff's performance of the contract "more expensive or burdensome." *Ramona Manor*, 225 Cal. Rptr. 2d at 124. In this case, it was substantially certain that Chevron's actions would disrupt Echazabal's relationship with Irwin and make his performance of his employment contract more burdensome. In response to Echazabal's EEOC filing, Irwin stated that it had no positions at the Chevron refinery (except for one clerk position) in which exposure to chemicals and solvents would not be likely. Accordingly, a fact-finder could conclude that Chevron's letter to Irwin made it certain that Echazabal would be removed from his employment at the refinery. In addition, a fact-finder could also conclude that Chevron's actions made it substantially certain that Echazabal would not obtain *any* work with Irwin. After it removed Echazabal from the Chevron refinery, Irwin, a general contractor providing maintenance and construction services to the petrochemical and energy industries, quickly determined that it would not assign Echazabal to a position at

any refinery because of his condition. Moreover, as Irwin acknowledged, "there is very little non-refinery work Mr. Echazabal is qualified to perform and very few such opportunities available."[3] These facts are sufficient to preclude summary judgment.

Chevron argues in the alternative that summary judgment is appropriate because Chevron's communication to Irwin was "justified." Justification remains an affirmative defense to a charge of intentional interference with a contract. *See Seaman's*, 686 P.2d at 1165. However, "[i]f the means [employed to interfere with the contract] are unlawful, the interference cannot be justified and is beyond the reach of this affirmative defense." *Savage*, 26 Cal. Rptr. 2d at 315. Interfering with the performance of a person's employment contract on a ground prohibited by federal law would fall within this rule. Because we hold in the accompanying opinion that Chevron is not entitled to summary judgment with respect to whether its actions in refusing Echazabal employment at the refinery were in violation of federal law, there is also a genuine issue of material fact as to whether Chevron's actions in seeking to have Irwin prohibit him from working at the refinery were unlawful. Accordingly, summary judgment is not appropriate.

REVERSED and REMANDED for further proceedings consistent with this disposition.

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[3] It appears that the few opportunities with Irwin that might conceivably have become available to Echazabal at some point were work opportunities that paid a substantially lower wage. Thus, even had Echazabal been offered such work and accepted it, Chevron's actions would have interfered with his employment contract by making that contract less valuable.

SUPREME COURT OF THE UNITED STATES

CHEVRON U.S.A., INC., PETITIONER

v.

MARIO ECHAZABAL, RESPONDENT

No. 00-1406

October 29, 2001

The petition for writ of certiorari is granted.